IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1873

KONRAD S. URI, PER NYMARK, ARNOLD RASMUSSEN, RONALD BEIRNES, BORGE H. MANNES, CARL PEROVICH, BJORN NYMARK, SVERRE A. YRI, OLE HENDRICKS, SIGMUND ANDREASSEN, CORY A. KALDESTAD, MICHAEL LYNCH, JR., LARS MYHRE, THOMAS HAUGAN and EMIL VINBERG,
Appellants,

v.

STATE OF ALASKA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

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Appellants,

v.

STATE OF ALASKA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

PRELIMINARY STATEMENT

Appellants appeal from the order of the Supreme Court of the State of Alaska entered on the 2nd day of April, 1976. The appeal is taken pursuant to Title 28, United States Code, Section 1257(2). In the event that this court holds that jurisdiction is not vested pursuant to said statute, appellants request that this statement be regarded as a petition for the writ of certiorari under 28 USC § 2103.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Alaska is reported at 456 P.2d 530. The opinion is set forth in the appendix at Appendix A, as is the mandate at Appendix B, and the order denying the petition for rehearing at Appendix C, respectively. The order and opinion of the Superior Court of the State of Alaska is not reported and is set forth at Appendix D.

JURISDICTION

1. Nature of the Case

These cases involve the assertion of jurisdiction by the State of Alaska over crab fishermen outside its territory. Appellants are commercial fishermen charged with having violated various regulations of Alaska purporting to govern the harvest of king crab in the Bering Sea. The offenses occurred, if at all, in an area some sixteen to sixty miles off the coast of Alaska. All appellants except appellant Vinberg are residents of states other than Alaska. All the charges relate to activities which occurred solely outside the State of Alaska except one count against appellant Kaldestad which alleges possession of king crab within the state of Alaska which had been taken offshore in the Bering Sea.

Alaska charged appellants with violation of Alaska Statues 16.10.200 and 16.10.210 which make it unlawful for a person to take shellfish in high seas areas designated by the Alaska Board of Fish and Game or in violation of the regulations promulgated by the Board governing the taking of shellfish in the designated areas or to possess within Alaska shellfish taken in violation of the rules or regulations of the Board. Pertinent regulations involved

in the charges as construed by the Alaska Supreme Court establish an assertion of Alaska jurisdiction over the entire Bering Sea. 5 AAC 34.005, 5 AAC 34.900. Appellants are charged under additional Alaska regulations with taking or possessing king crab within this registration area during a closed period.

The Superior Court of the State of Alaska dismissed all charges against appellants on the grounds that exclusive jurisdiction over the king crab fishery in the Bering Sea is vested in the federal government pursuant to the Outer Continental Shelf Lands Act, 43 USC 1331, *et seq*. The State appealed the dismissal and the Supreme Court of Alaska reversed in an opinion which held that (1) king crab were not subject to the exclusive jurisdiction of the federal government and (2) waters subject to the State of Alaska jurisdiction within the meaning of 5 AAC 34.005 included waters more than three miles from shore and (3) Alaska regulation of king crab fishing in the Bering Sea outside Alaska territory is not limited to citizens of that state.

2. The Decree Sought to Be Reviewed

On April 2, 1976, the Supreme Court of the State of Alaska entered its order reversing the order of dismissal entered by the Superior Court, finally determining the federal Constitutional defenses posed and remanding to the trial court for further proceedings. On May 10, 1976, appellants filed a Notice of Appeal to this Court in the Supreme Court of the State of Alaska.

3. Jurisdiction Is in This Court

Jurisdiction is vested in this court pursuant to Title 28, United States Code, Section 1257(2).

4. Cases Believed to Sustain the Jurisdiction

The defendants challenged the assertion of Alaska jurisdiction solely on the basis of the Federal Constitution. Under 28 USC 1257(2) an appeal can be taken where the validity of a state statute or regulation is drawn in question and the decision is in favor of validity. Review of the "statute" extends to every act legislative in character, including the regulations issued by the Alaska Board of Fish and Game. See *Sultan Ry. & Timber Co. v. Department of Labor & Industries,* 277 U.S. 135 (1928). The statute or regulation does not have to be invalid on its face if invalid in the manner of application. *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921). This Court is bound by the construction of State law adopted by the Alaska Supreme Court extending jurisdiction of the statutes and regulations in question outside Alaska territory. *Ward v. Krinsky,* 259 U.S. 503 (1921); *Bantam Books v. Sullivan,* 372 U.S. 58 (1963).

The order of the Alaska Supreme Court is final in that while it remanded the case for trial it precluded[1] defendant from again raising defenses based upon exclusive federal

1. "By virtue of our decision herein, we did not pass on other legal arguments advanced by appellees. The decision of the trial court was based on the doctrine of federal pre-emption, and he did not consider other grounds for dismissal. Clearly these arguments may be renewed in the trial court." App. A-58.

"In any event, appellees have not been precluded from raising specific defenses based on matters not previously determined by the trial court." App. C-3.

jurisdiction, lack of due process and interference with interstate and foreign commerce. The important question of jurisdiction outside Alaska territory has been finally determined by the state's highest court and has been resolved in favor of the state and against the federal Constitutional issue posed. *Local No. 483 v. Curry,* 371 U.S. 542 (1963) and *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), are the decisions of this Court which would appear to be controlling. See also *Packinghouse Workers v. Needham Packing Co.,* 376 U.S. 247 (1964), where the legal issue resolved by the highest state court could not be questioned on trial, the order was regarded as final even though trial was necessary to resolve the disputed facts.

On appeal before the Alaska Supreme Court, the United States intervened as *amicus curiae* in support of the defendants, arguing a lack of Alaska jurisdiction. The United States filed its brief through the Department of Justice "in consultation with other concerned federal agencies" and especially in consultation with the legal adviser for the Department of State.[2] The State of California appeared as *amicus curiae* urging reversal on the grounds that the "litigation concerns the rights of *any* coastal state, not just Alaska, to regulate fishing in waters beyond the territorial limits of the state."[3]

The decision in the court below was divided two justices to one.[4] The majority opinion recognized the importance of

2. Dissenting opinion of Justice Connor, App. A-78.

3. Application of State of California for leave to file *amicus curiae* brief.

4. Justice Burke did not participate in the decision as he had been the Superior Court Judge who had sustained the defendants' objections and dismissed the cases for lack of jurisdiction. His opinion appears at Appendix D.

the question and the desirability of review by this Court. The opinion of the court below states at App. A-39.

> "The issue as raised in this appeal is unquestionably of crucial import, for other states as well as our own, and in view of the closeness of the question—of the considerable merit we find in the arguments presented on both sides—this is a case uniquely appropriate for honoring the presumption of constitutionality and validity which adheres to the acts of our legislature. This court acknowledges its duty not to declare statutes unconstitutional unless such repugnancy clearly appears. We moreover acknowledge that our decision today may provide the most effective vehicle for assuring that this matter will at least receive the prompt and definitive attention by the final arbiters of such questions—the Congress or the Supreme Court of the United States."

The Alaska Supreme Court has entered an order staying further proceedings in the Superior Court until determination by this Court on appeal. See Appendix J.

Even prior to *Cox Broadcasting Corp.; Local No. 438 v. Curry* and *California v. Stewart*, 384 U.S. 436, 497 (1966), there were occasional departures from the strict finality requirements when intermediate rulings carried serious public consequences. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1944), or where public interest in avoiding uncertainty as to the ultimate resolution of an important legal issue favored consideration of the character of the decree as final.[5]

5. The strict finality of judgment is, of course, based on a desire to avoid piecemeal appeals and unnecessary decisions on federal questions. *Pope v. Atlantic Coast Line Ry.*, 345 U.S. 379 (1952). The most important competing considerations would appear to be the inconvenience and costs of piecemeal review on the one hand and the danger of delaying resolution of an important question on the other, *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1974); *Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. 469.

The issue presented as to the jurisdiction of Alaska over international waters is entirely separate from a decision on the merits; this question is too important—particularly where Alaska's assertion is made in defiance of the United States—and too independent of the merits to await review. *Local No. 438 v. Curry, supra*, 371 U.S. 514. In *Curry* this Court pointed out that where Georgia had finally and erroneously asserted its jurisdiction over a matter exclusively within the jurisdiction of the NLRB and the jurisdictional question was not subject to further review in Georgia courts, it was final. See also *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Harris v. Washington*, 404 U.S. 505 (1971). This is so even though federal questions are presented by the separate and unresolved issues remaining for trial. *Hudson Distributors v. Lilly*, 377 U.S. 386 (1964).[6]

Nor is the importance of the question diminished by the passage of the Fishery Conservation and Management Act of 1976. (H.R. 200) This Act will become effective on March 1, 1977. While it does vest the federal government with certain authority to pre-empt regulation of certain offshore fisheries, it provides:

> "Section 306. STATE JURISDICTION.
>
> (a) IN GENERAL.—Except as provided in subsec-

6. There is one additional federal question that was presented to both the Superior Court and the Supreme Court of Alaska which has not been ruled upon. That issue is whether or not the regulations defining the "registration area" wherein conduct is prescribed is unduly vague. The opinion of the court below in effect determined that the regulation must be sufficiently worded or construed to permit Alaska to enforce its laws beyond its territory. While the issue of vagueness might present a substantial question in another context, it is not of sufficient substance at this juncture to delay review on the more important questions of exclusive jurisdiction and jurisdiction of Alaska to act. Alaska *has* asserted jurisdiction.

> tion (b), nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any state within its boundaries. No state may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries unless such vessel is registered under the laws of such state."[7]

The second sentence in H.R. 200 permits state jurisdiction to be exercised over vessels "registered under its laws" which is not defined in the statute or the legislative history. Thus, the question as to the basic power of a state to act outside its territory is not answered by this Act and remains for this Court to resolve.

Moreover, Alaska seeks to extend its power beyond even the 200-mile contiguous zone. By its 5 AAC 34.900, it purports to exercise jurisdiction over the entire Bering Sea, "an area extending hundreds of miles beyond Alaska's territorial waters." *Hjelle v. Brooks*, 377 F.Supp. at 441. Two additional states, Oregon and California, have stated that they intend to exercise jurisdiction outside their territories in reliance upon the Alaska Supreme Court opinion below. See Appendices G and H.

This case meets two of the categories of cases defined by *Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. 469. It involves parties seeking review who may succeed in a lower court on a non-federal issue thus mooting the federal

7. The first sentence is similar to the substance of the Bartlett Act of 1966, 16 USC 1094.

> "Nothing in this chapter shall be construed as extending the jurisdiction of the states to the natural resources beneath and in the seas within the fishery zone established by this chapter or is diminishing their jurisdiction to such resources beneath and in the waters of the territorial seas of the United States."

This has been held pre-emptive of State jurisdiction in *Douglas v. Sea Coast Products, Inc.*, No. 75-1255.

question where further review of the federal question in state court is not permitted. 420 U.S. 481.[8] It also involves a situation where although the defendants might prevail at trial on a non-federal issue, a decision by this Court in their favor would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of or determining the admissibility of evidence in the state proceedings still to come. 420 U.S. 483.[9] In these circumstances, a refusal immediately to review would erode federal policy and create uncertainty. As is noted in the dissenting opinion of Mr. Justice Connor in the court below:

> "The reason for federal pre-emption must be drawn from the rationale of the First *California* case, supra. (332 U.S. 19) The whole area of regulation of ocean-floor resources is inextricably entwined with international law and affairs. As we have seen, any rights to regulate at all in the area of the Coninental Shelf derived from recent developments in the unsettled field of the international law of the sea."

An additional aspect of this issue is the already existing federal-state conflict between the opinion below and the opinions rendered by a three-judge panel in *Hjelle v. Brooks*, 377 F.Supp. 430 (D. Alaska 1974) and *United*

8. Similarly, in *California v. Stewart*, 384 U.S. 436, 497 (1966) an order remanding for trial of a criminal defendant was held to be final since if he had prevailed at trial on a non-federal ground there was no review available to the state of the federal question. In *Harris v. Washington*, 404 U.S. 505 (1971), a state court finally rejected a claim that the Constitution forbade a second trial. This was considered to be separate from the question as to whether the petitioner could be constitutionally convicted.

9. Compare *Chapman v. California*, 405 U.S. 1020 (1972), where a state court opinion overturning a motion to suppress and thus allowing the admission of certain evidence was held not to be final; *Arceneaux v. Louisiana*, 376 U.S. 336 (1964), an order denying a preliminary hearing to a criminal defendant was held not to be final.

States v. Ray, 423 F.2d 16 (5th Cir. 1970). The *Hjelle* case involved the attack before a three-judge federal panel by some of the same fishermen who are defendants below of certain Alaska regulations purporting to exercise jurisdiction in the Bering Sea beyond three miles from shore. Those regulations were enjoined by the *Hjelle* court on the basis that they denied the crab fishermen due process of law and unduly interfered with interstate commerce in directly applying to a resource located outside of the state. The regulations were somewhat similar to those at issue in the court below (and in fact identical to those under which defendant Bundrant was prosecuted in the companion case), but were repealed before the inception of this litigation. However, in principle, the issue was the same and the Alaska Supreme Court expressly refused to follow the reasoning of *Hjelle v. Brooks*.[10] The *Ray* case held, contrary to the court below, that resources of the Continental Shelf included living resources and that any doubt as to the meaning of this in the Outer Continental Shelf Lands Act had been resolved by the Geneva Convention on the Continental Shelf (1958).

Even the arguments raised by the dissent in *Cox* appear to be answered: (1) this case is of national import and not one of primarily local concern (420 U.S. 503); (2) the case already presents an existing conflict with a decision of a federal court and a state court, i.e. there is less harm from federal interference since it already exists and, in fact, Alaska's position was contested by the United States in the Court below. (Cf. 420 U.S. 503); (3) the issue is one that

10. See opinion below, pages 52-58. The *Hjelle* court in an opinion dated June 11, 1976, yet to be reported, dismissed the civil case on abstention principles after trial.

requires Supreme Court disposition and sound judicial administration would require it to be done sooner rather than later (420 U.S. at 506).

The issue presented is of national and international concern. Three states have now asserted jurisdiction outside their territories in conflict with the express claim of the United States. This assertion affects international fisheries. The position of Congress in the recently enacted H.R. 200 is ambivalent and does not answer the question of basic state power. Firm resolution by this court of the basic jurisdictional issue is required for the orderly management of this nation's offshore fisheries.

This court has noted jurisdiction in *Douglas v. Sea Coast Products, Inc.*, No. 75-1255, which involves questions of far less importance.

5. Alaska Statutes

"Sec. 16.10.200. *Unlawful taking prohibited.* It is unlawful for a person taking migratory fish and migratory shellfish in high sea areas designated by the board or in violation of the rules and regulations promulgated by the board governing the taking of migratory fish and migratory shellfish in the designated areas to possess, sell, offer to sell, barter, offer to barter, give or transport in the state, including the waters of the state, migratory fish or migratory shellfish."

"Sec. 16.10.210. *Unlawful sale or offer prohibited.* It is unlawful for a person to possess, purchase, offer to purchase, sell, or offer to sell in the state migratory fish or migratory shellfish taken on the high seas knowing that they were taken in violation of a rule or regulation promulgated by the board governing the taking of migratory fish or migratory shellfish in certain areas designated by the board or the commisioner."

6. Alaska Regulations

"5 AAC 34.005. *Statistical areas established*

"(a) For the king crab fishery, there are established the following statistical areas with the following code letters:

"*Code Letter*

AD — the waters specified in sec. 100 of this chapter
E — the waters specified in sec. 200 of this chapter
H — the waters specified in sec. 300 of this chapter
K — the waters specified in sec. 400 of this chapter
LM — the waters specified in sec. 500 of this chapter
O — the waters specified in sec. 600 of this chapter
R — the waters specified in sec. 700 of this chapter
S — the waters specified in sec. 800 of this chapter
Q — the waters specified in sec. 900 of this chapter

"(b) Each statistical area consists of:

"(1) a registration area, comprised of all the waters within the statistical area which are waters subject to the jurisdiction of the state; and

"(2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

"(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.

"(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting waters subject to the jurisdiction of the state."

"5 AAC 34.900. *Description of statistical area*

"Statistical area Q includes the waters of the Bering Sea and Chukchi Sea including all tributary bays except Bechevin Bay and Isanotski Strait (as described in 5 AAC 34.500), north of 54°36′ N. Lat., (the latitude of Cape Sarichef)."

"5 AAC 34.090. *Unlawful possession of king crab or king crab gear*

"(a) It is unlawful for any person to possess unprocesed king crab aboard a vessel licensed as a commercial fishing vessel within any registration area unless the vessel is valididly registered for the area and the season is open, or unless the person is acting pursuant to the authorization of sec. 030(d) of this chapter. This prohibition shall not apply to king crab possessed for subsistence purposes if otherwise consistent with applicable regulations.

"(b) It is unlawful for any person to possess aboard a vessel licensed as a commercial fishing vessel within any registration area any king crab or any gear (including aggregate amounts of gear) used in the taking of king crab which are prohibited by other regulations in this chapter governing such registration area.

"(c) It is unlawful for any person to possess, purchase, sell, barter, or transport king crab within the state or within the waters subject to the jurisdiction of the state if that person knows or has reason to know that such king crab were taken or possesed in contravention of the regulations of this chapter.

The text of the pertinent Constitutional provisions, federal and state statutes, Alaska regulations, conventions and international agreements, are set forth in Appendix F.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, despite the objection of the United States, Alaska may assert jurisdiction over the king crab fishery in the Bering Sea outside Alaska territory.

2. Whether the federal government has exclusive jurisdiction of the living resources of the Continental Shelf including crab.

3. Whether Alaska may regulate and control fishing by citizens of other states outside Alaska's territory.

4. Whether Alaska may indirectly assert jurisdiction outside its territory over an international fishery by prohibiting the landing in state of king crab taken from the Outer Continental Shelf.

5. Whether enforcement of Alaska law as to king crab in the Bering Sea outside Alaska's territory is violative of the Supremacy Clause, Article VI, Clause 2, The Commerce Clause, Article I, Section 8, and the Due Process Clause, Amendment Fourteen of the Constitution of the United States.

STATEMENT OF THE CASE

Defendants-Appellants are commercial fishermen charged with having violated various regulations of Alaska purporting to close king crab fishing in the Bering Sea outside Alaska territory.

In 1969 the Alaska Board of Fish and Game began efforts to regulate king crab fishing in the Bering Sea and promulgated 5 AAC 07.100 which defined the "Bering Sea shellfish area" (BSSA) described as:

> "All waters of the Bering Sea including all tributary bays except Bechevin Bay and Isanotski Strait north of 54°36′ North latitude, (the latitude of Cape Sarichef), south of 60° North latitude and east of the U.S.-Russia Convention line of 1867."

This was followed in 1973 by an assertion of Alaska jurisdiction over the Bering Sea by establishment of a maximum quota of 23,000,000 pounds of crab which could be taken from that area for the 1973-74 season. (5 AAC 07.760). This regulation was not limited to Alaska territory nor was it limited in its application to citizens of Alaska. The Board also prohibited possession or sale of crab taken "in violation of the rules and regulations promulgated by the

Board" if such crab were taken in waters seaward of the state's territorial waters. (5 AAC 36.040).

The Bering Sea shellfish area quota of 23,000,000 pounds was reached on September 9, 1973, whereupon by field order the area was closed to crabbing until June 15, 1974.

In December 1973, several crab fishermen, including defendant Uri, brought suit in the United States District Court for the District of Alaska and requested a preliminary injunction against enforcement of 5 AAC 07.760 and 5 AAC 36.040. A three-judge district court was convened and, after hearing, on April 30, 1974 enjoined the state from enforcing those regulations on the ground that they violated the Commerce Clause and that the due process requirement of the Fourteenth Amendment limited Alaska to its geographical boundaries. *Hjelle v. Brooks,* 377 F.Supp. 430 (D. Alaska 1974).

Following this decision, the Board repealed the enjoined regulations and issued a set of comprehensive regulations.[11] These regulations basically prohibited the taking and possesion of crab in a closed area. The system of designation of closures was created by 5 AAC 34.005, whereby certain "statistical areas" were created, consisting of:

> "(1) A registration area, comprised of all the waters within the statistical area which are waters subject to the jurisdiction of the state; and
>
> (2) An adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area."

Statistical Area Q is defined in 5 AAC 34.900 as "the waters of the Bering Sea and Chukchi Sea including all tributary

11. 5 AAC 34.005-.940, 5 AAC 03.710, 5 AAC 06.710, 5 AAC 21.910.

bays except Bechevin Bay and Isanotski Strait . . . north of 54°36′ N. lat., (the latitude of Cape Sarichef)." On June 25, 1974, the Commissioner of Fish and Game Brooks signed a finding of emergency which stated that crab pots had been observed in the Bering Sea, that this was a flagrant challenge to his authority and that the season was therefor closed indefinitely pursuant to an amended regulation. (5 AAC 34.910, effective June 25, 1974). Thereafter, all the defendants were charged with having on various dates between June 30, 1974 and July 24, 1974 possessed king crab during a closed season within the registration area[12] with having king crab pots in an operable condition in the registration area during a closed period[13], with having taken king crab within the registration area during a closed period[14]. On the face of the complaint against each defendant a statement is made in each count that the alleged conduct took place at latitude and longitude coordinates between 16 and 60 miles from shore. In addition, defendant Kaldestad is charged with illegally possessing king crab within the state which had previously been taken at latitude and longitude coordinates beyond three miles from shore.

Defendants moved to dismiss the charges for lack of jurisdiction. In support of their motion defendants introduced portions of depositions taken from state management and scientific personnel in *Hjelle v. Brooks* which demonstrated that the king crab fishery is a high seas fishery, at least in the Bering Sea, and that the vast majority if not all of the king crab taken in the Bering Sea are taken outside

12. 5 AAC 34.910, 34.098 and 34.090(c).
13. 5 AAC 34.910, 34.095.
14. 5 AAC 34.910.

Alaska territory. The motion urged that Alaska had no authority to regulate king crab as a creature of the Outer Continental Shelf, that enforcement of the regulations outside Alaska territory would unduly restrain commerce and denied defendants due process of law and that Alaska was without authority to act outside of her territory as any such authority was vested solely in the federal government.

The Superior Court held that the state was without authority to regulate king crab in the Bering Sea since crab are a resource of the Continental Shelf and subject to the exclusive jurisdiction of the federal government. (Appendix D). The final order in the Superior Court was entered on January 20, 1975 denying reconsideration. On January 29, 1975, both houses of the Alaska legislature unanimously passed a resolution condemning the actions of the crab fishermen here involved. (Appendix I).

The State filed a notice of appeal and the Alaska Supreme Court ordered the matter to be processed on an expedited basis with simultaneous briefs being exchanged by the parties. The State of California appeared as *amicus curiae* supporting State jurisdiction and the United States appeared opposing this extension of jurisdiction and supported the defendants. The United States stated that the federal government does claim exclusive jurisdiction over living resources of the Outer Continental Shelf, including king crab, and that the State of Alaska had no authority to assert extra-territorial jurisdiction over non-Alaskans. On January 19, 1976, in a two to one decision (two Justices of the court not participating), the decision of the Alaska Superior Court was reversed. The court held (1) that the federal government did not have exclusive jurisdiction over

king crab as creatures of the Outer Continental Shelf, (2) that it disagreed with *Hjelle v. Brooks*, 377 F. Supp. 430, and (3) that Alaska did have power to regulate beyond the three-mile limit without conflicting with either due process requirements or unduly interfering with commerce. In his dissenting opinion, Mr. Justice Connor agreed with the trial court that the regulation of king crab was subject to exclusive federal jurisdiction.[15]

On April 2, 1976, the mandate was issued and on May 10, 1976, a notice of appeal to this Court was filed in the Alaska Supreme Court. A stay of proceedings in the Superior Court was then granted by the Alaska Supreme Court pending disposition of this appeal.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. Whether Despite the Objection of the United States, Alaska May Assert Jurisdiction Over the King Crab Fishery In the Bering Sea Outside Alaska Territory

The power of a State to extend its political jurisdiction beyond its coastline is clearly limited. The maritime areas adjoining the coast of a state (or nation) may be divided into three parts—inland waters, marginal or territorial seas and high seas. Inland waters are essentially bays and other waters within the land territory of the state. The marginal belt extends three miles from the coast or outer limit of inland waters,[16] and is an area over which a coastal

15. During the appeal the *Hjelle* case proceeded to trial on the merits. The *Hjelle* court first stayed decision pending issuance of the Alaska Supreme Court opinion, then dismissed the case on grounds of abstension under *Younger v. Harris*, 401 U.S. 37 (1971).

16. Texas and Florida are exceptions from this general statement. For historical reasons not applicable to Alaska, the marginal sea extends three marine leagues from the coast of those two states. *United States v. Florida*, 363 U.S. 121 (1960).

nation[17] exercises exclusive jurisdiction. Beyond the marginal seas are the high seas which, under international law, are free of any nation's jurisdiction except for extremely limited purposes. See *United States v. Alaska*, 45 L. Ed. 2d 109 (1975); Jessup, *Territorial Waters and Marine Jurisdiction* (1927); Shalowitz, *Shore and Sea Boundaries* (1962); Gross, *The Marine Boundaries of States*, 64 Mich. L.Rev. 609 (1966).

Domain over the territorial (three mile limit) sea was first accomplished by the national government rather than the colonies or by the states. *United States v. California*, 332 U.S. 19 (1947); *United States v. Maine*, 420 U.S. 515 (1975). In 1953, in response to these decisions, Congress passed the Submerged Lands Act, 43 USC 1301-1315, which permitted the states to exercise limited jurisdiction over the territorial sea.[18] The purpose of the Submerged Lands

17. The word "state" is often used to describe a nation, state or country in international law. To avoid confusion, this brief will use the term "nation" when referring to a national sovereign and use the term "state" to refer to political subdivisions of the United States of America. However, some of the materials quoted in this brief (i.e., the Continental Shelf Conventions) do refer to "nations" as "states".

18. The three-mile limit on territorial jurisdiction still pertains even to the United States although Congress has appended a nine-mile zone contiguous to the territorial sea for control of fisheries. 16 USC 1091-94. The individual states are expressly excluded from any control in this contiguous zone. 16 USC 1094. "Nothing in this chapter shall be construed as extending the jurisdiction of the states to the natural resources beneath and in the waters within the fisheries zone . . ." For legislative history, see 1966 U.S. Code and Administrative News, 3282, 3290-1 (H.R. 2086). "In order to avoid any misunderstanding or misinterpretation of the language of the legislation, your committee felt it desirable to add a new section to make it clear that the jurisdiction of the coastal states to regulate the fisheries and to manage and develop the natural resources beneath and in the waters of the territorial sea (out to three miles from shore) was neither increased nor decreased, nor was the jurisdiction of the coastal states to regulate the fisheries and to manage and control any resources beneath and in the waters of the newly established fisheries zone extended to such zone. Thus, the amendment would recognize the jurisdiction of the states within the three-mile coastal area, but would disclaim any extension of coastal state jurisdiction to the fisheries zone contiguous to this area." See also *Douglas v. Sea Coast Products, Inc.*, No. 75-1255, before this court.

Act was in part to set state maritime boundaries—to permit state sovereignty to extend (for some purposes at least) to a point three miles beyond the coastline. The Act, with its concomitant three-mile boundary, was specifically made applicable to Alaska by the Act of Admission, 72 Stat. 339.[19] The opinion below appears to note that Alaska has not extended its boundaries beyond the three-mile limit (see *Hjelle v. Brooks*, 337 F. Supp. 430) apparently recognizing that such an effort is beyond Alaska's power. *United States v. California*, (Second California), 381 U.S. 139 (1965); *United States v. Maine*, 420 U.S. 515.

Thus, the territorial jurisdiction of the State of Alaska is limited to the area three miles from the coast and then only absent conflicting federal law. *Toomer v. Witsell*, 334 U.S. 385. The application of this principle is pending before this court in *Douglas v. Sea Coast Products, Inc.*, No. 75-1255. This court stated in *Manchester v. Massachusetts*, 139 U.S. 240, 263 (1891):

> "The jurisdiction of the state is coextensive with its territory; coextensive with its legislative power." 139 U.S. 240, 263.

In *Alaska v. Arctic Maid*, 366 U.S. 199 (1961), Alaska attempted to tax the operations of salmon freezer boats operating within Bristol Bay but more than three miles from shore. The defendants there were citizens of Washington and California. Salmon is an important resource of the Bering Sea and the Alaskan economy has long been influenced by it. But nevertheless this Court concluded that

> "if the fish were taken or purchased outside Alaska's territorial waters, all of respondents' business in the Bristol Bay area would be beyond Alaska's reach." 366 U.S. 199, 203.

Though states are limited to the exercise of jurisdiction of fishing to territorial waters, it has been held that a state may exercise some jurisdiction over its citizens while fishing beyond state boundaries. *Skiriotes v. Florida*, 313 U.S. 69 (1941) is generally recognized as the leading example of this concept but in the *Skiriotes* case there was some question as to whether the violation which occurred six miles offshore was within the waters of Florida. The seaward boundary of Florida was later confirmed at nine miles. *United States v. Florida*, 363 U.S. 121 (1960). The rationale of this holding is that the relation of a citizen to his sovereign, whether state or federal, extends to more than just a geographic area. The reciprocal right of the citizen to vote for legislative change must bear heavily on the nature of this relationship.[20]

Since the alleged criminal conduct of all defendants except the one count against defendant Kaldestad,[21] occurred outside the boundaries of the state, Alaska law cannot

19. It was, of course, necessary for Congress to authorize Alaska and other states to acquire boundaries outside of their inland waters, or as this court has noted:

> "The power to admit new states resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations. From the former springs the power to establish state boundaries; from the latter comes the power to determine how far this country will claim territorial rights in the marginal sea as against other nations." *United States v. Louisiana*, 363 U.S. 1, 35 (1960).

20. Pertinent to this consideration is the Joint Resolution dated January 29, 1975, passed unanimously by both houses of the Alaska legislature condemning the actions of the crab fishermen as "nonresident fishermen" in this case as well as the actions of their association. Appendix I. Only one of the defendants, Vinberg, is a citizen of the State of Alaska.

21. The Kaldestad prosecution must fail under the Supremacy Clause because exclusive jurisdiction by the federal government over living shelf resources, ante p. 23.

be constitutionally applied to that conduct as it denies due process required by the Fourteenth Amendment. *United States v. California*, 332 U.S. 19 (1946); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Norfolk & Western Ry. v. Missouri Tax Comm'n.*, 390 U.S. 317 (1968).

The assertion of jurisdiction over activities on the high seas constitutes an unreasonable restraint on interstate and foreign commerce. A state statute or regulation may be invalid as conflicting with the Commerce Clause because it is an illegal attempt to control activity beyond the borders of the state. *Norfolk & Western Ry. v. Missouri Tax Comm'n., supra*, 390 U.S. 317; Cf. *Florida Avocado Growers v. Paul*, 373 U.S. 132 (1963); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

The court below erroneously extended the holding of *Skiriotes*—over the objection of the federal government—to all citizens of the United States. *Skiriotes* has probably proven unwieldly in application to modern international fisheries and it can reasonably be predicted that it will be overruled. This result is not now necessary to reverse the court below. The Alaska Supreme Court bases its extra-territorial jurisdiction entirely upon the fact that king crab occasionally migrate into state waters though it is acknowledged little, if any, fishing is done there. Alaska does not own the king crab resource merely because some crab sometimes migrate into the state's territorial waters. *Missouri v. Holland*, 252 U.S. 416 (1920) (rejecting Missouri's claim to ownership of migratory birds); *Toomer v. Witsell*, 334 U.S. 385 (1947) (rejecting South Carolina's claim to shrimp, also a migratory shellfish).

In view of the exclusive jurisdiction in the Federal Government, Alaska may not take solace in prosecuting defendant Kaldestad under its "landing law". These laws have been allowed in limited situations to permit enforcement indirectly outside state territory by prohibiting the landing of fish within a state during a closed season. See, *e.g. Bayside Fish Flour v. Gentry*, 297 U.S. 422 (1936), permitting this type of enforcement where "wholly local" in effect. Although described by Justice Cardozo as "border" cases, *Baldwin v. Seelig*, 294 U.S. 511, 525 (1935), and of dubious value in dealing with modern international fisheries in the face of the Commerce Clause, these cases need not be overturned here to reverse the opinion below. Since exclusive jurisdiction is vested in the Federal Government, a local law may not be utilized to control landings.

The ruling of the Alaska Supreme Court is the first time that a state has asserted full jurisdiction over citizens of other states in the conduct of an offshore fishery. Alaska is now followed by both the states of Oregon and California which have declared that they intend to likewise apply their fisheries laws beyond their territories in a manner not limited to the citizens of their own states.

II. Exclusive Jurisdiction Over Living Resources of the Continental Shelf, Including Crab, Is Vested in the Federal Government

The effect of the decision of the court below has national and international implications. The Bering Sea king crab fishery is actively fished by both the USSR and Japan. Agreements setting forth gear and quotas exist with both countries. Appendix F, page 19. It was at the primary request of the Department of State that the United States appeared as *amicus curiae* in the court below and supported

the position of the crab fishermen. Alaska and California urged, and the court below accepted, the position that living resources of the Shelf were not included within the definition of "resources" under the Outer Continental Shelf Lands Act. This is a position in direct conflict with an International Convention and congressional statute. See 15 UST 471, T.I. A.S. 5578 (1958); 43 USC §§ 1331-1343.

In his opinion in the court below, Mr. Justice Connor agreed with the position of the fishermen and of the United States and with the holding of the Superior Court[22] that exclusive jurisdiction of king crab is in the Federal Government.

As he viewed it, the touchstone for the concept of exclusive jurisdiction comes from *United States v. California*, (First California), 332 U.S. 19 (1947). There this Court reasoned that:

> "The protection and control of [the marginal sea] has been and is a function of the national external sovereignty." 332 U.S. at 34.

This principle has been followed in the *United States v. Louisiana*, 339 U.S. 699 (1950).

> "As we pointed out in *United States v. California*, the issue in this class of litigation does not turn on title or ownership in the conventional sense. California, like the thirteen original colonies, never acquired ownership in the marginal sea. A claim to our three-mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty. 332 U.S. pages 31-34. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area." 339 U.S. at 704.

22. Decided by Mr. Justice Burke, now on the Alaska Supreme Court but who did not participate in the appeal.

This concept was recently reaffirmed by this court in *United States v. Maine*, 320 U.S. 515 (1975) which relied on *United States v. Texas*,[23] *United States v. Louisiana* and *United States v. California* in holding that:

> "In external affairs the United States became the sole and exclusive spokesman of the nation." 420 U.S. 523.

The *Maine* and *California* cases dealt with whether or not the federal government had exclusive jurisdiction over the natural resources of the seabed within the marginal sea. Only oil and gas were important there but the concept discussed could apply equally to living sedentary species of the Shelf. In answer to the *California* case, the Submerged Lands Act was in fact passed to grant to the states limited dominion over the offshore seabed and its resources within the marginal sea. 43 USC 1301-1315. However, as part of the Submerged Lands Act, an express Congressional statement was made with regard to the resources lying seaward of the marginal sea. 43 USC 1302 (1953) provides:

> "Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and the seabed of the Continental Shelf lying seaward and outside of the area of lands beneath the navigable waters, as defined in Section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed."

23. Thus, it was recognized in *United States v. Texas*, 339 U.S. 707 at 719:
"If the property, whatever that may be, lies seaward of the low water mark, its use, disposition, management and control involve national interests and national responsibilities."

The Submerged Lands Act was passed in May 1953 and was managed by Senator Guy Cordon (Oregon). In analyzing the Submerged Lands Act, this Court placed great reliance upon Senator Cordon's debates and his explanation of the act before the Senate. See *United States v. California*, 381 U.S. 139, 150-163 (1965) (Second California). Later in that same year, in what was considered until its final passage as an amendment to the Submerged Lands Act,[24] Congress passed the Outer Continental Shelf Lands Act, on August 7, 1953. The Act specifies that the jurisdiction of the United States is extended to the "subsoil and seabed" of the Outer Continental Shelf for the purpose of exploring for, developing and removing "resources therefrom to the same extent as if the Outer Continental Shelf were an area of exclusive federal jurisdiction." 43 USC 1333(a)(1). Another section of the Act, 1333(a)(2) provides that federal officers and courts may enforce on the Continental Shelf civil and criminal laws of each adjacent state; however, this was to "never be interpreted as the basis for claiming any interest in or jurisdiction on behalf of any state for any purpose over the seabed . . . or the property and natural resources thereof." 43 USC 1333(a)(3). The legislative history shows that two attempts were made by states rights senators to amend the Act to permit concurrent jurisdiction to control the disposition of the natural resources. Both these attempts were defeated on the argument of Senator Cordon that:

> "With respect to the Outer Shelf lands, they are wholly outside the boundary of any state, and there is no jurisdiction on the part of any state." 1953 Congressional Record, Senate, pages 7226-7232, 10472.

24. H.R.Rep. 413, May 12, 1953.

Additionally, Cordon indicated strong approval for the position of the Department of Justice that:

> "Particularly in view of the intermingling of national and international rights in the area, it is important that the federal government, which has the responsibility of foreign relations, have the exclusive control of law making and law enforcement there. 99 Cong. Rec. 6963 (1953).

The lower court here bases its decision that king crab are not a Shelf resource within the meaning of the statute on the ground that crab are included within the living resources in the water column above the Shelf. However, this is contrary to the definition of sedentary species as Shelf resources as contained in the Geneva Convention on the Continental Shelf, 15 UST 471, T.I.A.S. 5578 (1958). "[T]o the extent that any of the terms of the [OCSLA] are inconsistent with the later developed Geneva Convention on the Continental Shelf, they should be considered superseded." *United States v. Ray*, 423 F.2d 16, 21 (5th Cir. 1970). The lower court ignored both the Geneva Convention definition and expressly refused to follow *United States v. Ray*. If this opinion is allowed to stand it will remain the only opinion which holds that living resources are not natural resources of the Continental Shelf and thus are subject to control by the states.

CONCLUSION

The Alaska Supreme Court has asserted jurisdiction in the following terms:

> "In order that there is no confusion with regard to our holding, we reiterate that the difference in status between each offender does not affect Alaska's jurisdiction over him. Whether the appellee was an Alaska resident (as is Vinberg), was arrested within the three-

> mile limit (as was Bundrant), or was arrested on the high seas in the Bering Sea crab area (as was Uri), the state may proceed to enforce its crab regulations herein against said appellee."

The finality of the lower court's decision on these questions is firmly established. Unless the uncertainty created by the decision below as to the ability of states to exercise sovereignty outside their territory is resolved by this court, it is certain that at least Alaska, Oregon and California will make further claims extending their jurisdiction over international waters in defiance of the federal government and decisions of the federal courts.

For the foregoing reasons, it is respectfully submitted that the federal questions posed are substantial and that this Court should note probable jurisdiction.

Respectfully submitted,

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June 1976

CERTIFICATE OF SERVICE

I, DOUGLAS M. FRYER, a member of the Bar of the Supreme Court of the United States and one counsel for Appellants in the above-captioned matter, hereby certify that three (3) copies of this Jurisdictional Statement have been served upon each counsel of record for the parties herein by depositing the same in the United States Post Office with postage prepaid (airmail designation no longer required by post office), this 25th day of June, 1976, as follows:

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Attention: EVELLE J. YOUNGER, CARL BORONKAY
and RODERICK WALSTON

All persons required to be served have been served.

DOUGLAS M. FRYER

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant, v. CHARLES BUNDRANT, Appellee.	File No. 2295
STATE OF ALASKA, Appellant, v. KONRAD S. URI, et. al., Appellees.	File No. 2435
STATE OF ALASKA, Appellant, v. CORY A. KALDESTAD, Appellee.	File No. 2444 O P I N I O N [No. 1232 - January 19, 1976]

Appeal from the Superior Court, Third Judicial District, State of Alaska,

Anchorage, Edmond W. Burke, Judge, in Uri, et al., and Kaldestad; and Eben H. Lewis, Judge, in Bundrant.

Appearances: Office of Attorney General of Alaska, Juneau, Gerald W. Markham, Assistant Attorney General, Anchorage, for Appellant. David B. Ruskin, Anchorage, for Appellee Bundrant. William B. Rozell, of Faulkner, Banfield, Doogan & Holmes, Juneau, and Douglas M. Fryer, of Moriarty, Long, Mikkelborg & Broz, Seattle, Washington, for Appellees Uri, et al., and Kaldestad. Edward H. Levi, Attorney General of the United States, Wallace H. Johnson, Assistant Attorney General, and Bruce C. Rashkow and Michael W. Reed, Department of Justice, Washington, D. C., as amicus curiae for the United States. Evelle J. Younger, Attorney General of California, Carl Boronkay, Assistant Attorney General, and Roderick Walston, Deputy Attorney General, as amicus curiae for California.

Before: Rabinowitz, Chief Justice, Connor and Erwin, Justices. [Boochever and Burke, Justices, not participating.]

ERWIN, Justice.
RABINOWITZ, Chief Justice, concurring.
CONNOR, Justice, dissenting.

King crab occur in harvestable numbers in several areas of the Bering Sea off the coast of Alaska. Beginning in the late 1960's, the number of fishermen taking crabs from the Bering Sea increased significantly. As a result, in 1969 the Alaska Board of Fish and Game began efforts to regulate crabbing in that area, with the promulgation of 5 AAC 07.100, which created the "Bering Sea Shellfish Area" (BSSA), described as:

> . . . all waters of the Bering Sea including all tributary bays except Bechevin Bay and Isanotski Strait . . . north of 54° 36′ N. lat., (the latitude of Cape Sarichef), south of 60° N. lat., and east of the U.S. - Russia Convention line of 1867.

In 1973, in an effort to avoid the eventual depletion of this resource and to preserve the fishery at sustained yield levels, the Board established a maximum quota of 23 million pounds of crab for this area for the 1973-74 season (5 AAC 07.760).[1] It also prohibited possession or sale of crab taken "in violation of the rules and regulations promulgated by the board" if such crabs were taken in waters seaward of the state's territorial waters (5 AAC 36.040).

The Bering Sea Shellfish Area quota of 23 million pounds was reached on September 9, 1973, whereupon by field order the area was closed to crabbing until June 25, 1974.

In December, 1973, several crab fishermen brought suit in Federal Court, asking for a preliminary injunction against enforcement of 5 AAC 07.760 and 5 AAC 36.040. A three-judge District Court heard the case, Hjelle v. Brooks and on April 30, 1974, enjoined the state from enforcing those regulations.[2]

Following this decision, the Board repealed the enjoined regulations and took alternative

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1. According to a fish and game department biologist, this regulation was promulgated at the request of the National Marine Fisheries Service and "other interested parties."

2. 377 F. Supp. 430 (D. Alaska 1974).

steps to govern crabbing in the Bering Sea in the season due to begin July 1, 1974. On May 9, 1974, the Board issue a stopgap regulation prohibiting possession of red king crab in the state until June 30 1974 (5 AAC 39.690). On June 15, the Board repealed all previous king crab regulations (except the definition and gear limitation sections, 5 AAC 39.105, and 5 AAC 39.975) and issued a comprehensive set of emergency regulations (5 AAC 34.005-.940, 5 AAC 03.710, 5 AAC 06.710, 5 AAC 21.910). These regulations basically prohibited the taking and possession of crabs in a closed area. A system of designation of closures was created by 5 AAC 34.005, whereby "statistical areas" were created, consisting of

> (1) a registration area, comprised of all the waters within the statistical area which are waters subject to the jurisdiction of the state; and
>
> (2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

The acts giving rise to this appeal occurred in Statistical Area Q, defined in 5 AAC 34.900 as "the waters of the Bering Sea and Chuckchi Sea including all tributary bays except Bechein Bay and Isanotski Strait . . . north of 54° 36'N. lat., (the latitude of Cape Sarichef)." 5 AAC 34.910, provided that the crabbing season for this area was to open on July 1, 1974.

Prior to July 1, an organization of Bering Sea crab fishermen (according to news accounts, based in Seattle), called the "Shellfish Conservation Institute," promulgated their own rules for the upcoming Bering Sea season. This group's rules called for the seaon to open on

June 26.[3] Even before that date surveillance flights showed a large number of vessels engaged in crab fishing in the Bering Sea.[4] In response, on June 25 the board issued emergency regulations 5 AAC 07.710(b), 5 AAC 34.035(c)(5), 5 AAC 34.045, 5 AAC 34.095(c), and 5 AAC 34.910. These regulations basically put off the opening of the season and gave the commissioner of Fish and Game discretion to open the season when "general order can be restored and the state can be assured that fishing will be conducted in a manner which will not jeopardize the rights of law abiding fishermen."[5] The Commissioner also issued notices that the season would not open until all illegal crab pots were removed from the area. The fishermen who had been successful in the earlier Hjelle case asked the federal district court for a temporary restraining order against the new regulations, but it was denied.

All of the individual cases consolidated in this appeal arise from alleged violations of these closures or related regulations.

THE INDIVIDUAL CASES

A. In No. 2295, defendant Bundrant was charged in superior court with seven counts of possession of migratory shellfish near St. Paul Island (within the three-mile limit) on various dated in October, 1973, which shellfish were taken "upon the high seas and the Bering Sea shellfish area" during a closed period under fish and game board regulations. The statutory reference in the complaint

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3. See "Board of Fish and Game Finding of Emergency" (issued June 25, 1974), Appellant's Brief No. 2435, at 36-37.

4. Id.

5. Id.

is to AS 16.10.200, which reads:

> It is unlawful for a person taking migratory fish and migratory shellfish in high seas areas designated by the board or in violation of the rules and regulations promulgated by the board governing the taking of migratory fish and migratory shellfish in the designated areas to possess, sell, offer to sell, barter, offer to barter, give or transport in the state, including the waters of the state, migratory fish or migratory shellfish.

Bundrant moved to dismiss for lack of jurisdiction, asserting the invalidity of the Board's regulations. The motion was denied on March 27, 1974, but on September 10, after the federal court in Hjelle had enjoined enforcement of 5 AAC 36.040, the trial judge reconsidered and granted the motion to dismiss.

Bundrant is a legal resident of Washington state and is not a resident of Alaska.[6] He held commercial fishing licenses in Alaska in 1965-70 and in 1973. His vessel, the F. V. Billikin, was registered in Alaska along with its gear. During the 1973 season he had fished within the three-mile limit (although during the period of the violations, October 6-20, 1973, he fished only outside the three-mile zone). He had anchored and processed crabs within the zone every night during this period. He maintained in Dutch Harbor, Alaska, a warehouse for use in processing his catch. He received fuel, food, water, repairs, and emergency aid from Alaskans, and used fisheries data from the Alaska Department of Fish and Game.

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6. This information is from stipulations entered in the record.

B. In No. 2435, the defendants Uri, et al., charged with numerous counts of possession of king crab on several dates between June 30, 1974, and July 24, 1974, within a closed area; with possession of crab pots in a closed area; and with having taken crab in a closed area. These activities all took place from 16 to 60 miles from the Alaska coast. (Actually only one defendant, Perovich, is charged with fishing before July 1, the original opening date for the area.)

The statutory references in the complaints are to AS 16.05.920 (unlawful possession), AS 16.10.200 (unlawful taking), 5 AAC 34.900, 5 AAC 34.910, 5 AAC 34.098, and 5 AAC 34.090(c).

With the exception of Emil Vinberg, all of the defendants in this group are residents of states other than Alaska.

The conduct cited here as criminal all took place outside the three-mile limit (in distinction to Bundrant, who is charged with possession within territorial waters of shellfish illegally taken outside of it). The state offered proof that after setting their pots outside the three-mile limit, the defendants returned to territorial waters. Although the Uri record has no stipulations like those in Bundrant regarding ongoing contact with Alaska while operating in the Bering Sea, there was testimony in Uri to the effect that American crabbers in the Bering Sea always use processing facilities in Alaskan ports because the fragility of king crab rules out travel to more distant ports.

The Uri defendants moved to dismiss on a number of grounds, including lack of jurisdiction, the unconstitutional vagueness of the regulations, and the illegaility of the search of defendants' crab pots. The motion was granted by the trial judge, who adopted the defendants' argument that these regulations had

intruded upon and were in conflict with an area of exclusive federal jurisdiction established by the Outer Continental Shelf Lands Act and were consequently prohibited by Article VI of the Constitution of the United States.

C. In No. 2444, defendant Kaldestad was charged with four counts, the first three of which are identical to the charges against the Uri defendants. The fourth count, however, charged possession within the three-mile limit of shellfish taken illegally outside of it (this being basically the sme charge as that made against Bundrant, the distinction being that Bundrant was charged under the old regulations while Kaldestad was charged under the emergency regulations).

The statutory references in the fourth count of the complaint are to AS 16.10.200,[7] 5 AAC 34.910, 5 AAC 34.098, and 5 AAC 34.090(c).

Kaldestad's case was handled below together with the Uri cases, and the trial court's dismissal applied to it as well. In his memorandum, the judge noted that "these cases do not involve the state's jurisdiction to enact and enforce so-called 'landing laws.' The charges in these cases specifically relate to conduct wholly occurring outside of Alaska's territorial waters." Somehow, the fourth count against Kaldestad escaped the judge's attention.

In summary, the Uri defendants are charged with wholly extra-territorial activity prohibited by the emergency regulations. Bundrant is charged with possession in the state's waters of shellfish taken outside it in contravention

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7. AS 16.10.200 is the state's "landing law," barring illegal taking on the high seas and subsequent possession in the state.

of the old regulations. Kaldestad is charged with both prohibited extra-territorial activity and with possession in the state's waters of shellfish taken outside it in contravention of the emergency regulations.

Of all the defendants, only Emil Vinberg, of the Uri group, appears on the record to be an Alaskan citizen.

GENERAL LEGAL SETTING

It has long been held that for most purposes, the nation's territorial limits are set at a point three miles distant from the low water line on the coast.[8] Although the United States and international law have historically recognized some limited exercise of sovereign authority beyond this point (e.g., for control of smuggling), the three-mile territorial boundary has enjoyed continued and general favor for a great many years.

For the United States, the first significant departure from this policy came in 1945, when President Truman issued a proclamation stating that

> the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.[9]

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8. There are ongoing disputes as to the method of calculating this line, but they are not generally relevant here. In general, see A. Gross, The Maritime Boundaries of the United States, 64 Mich. L. Rev. 639 (1966).

9. Proclamation No. 2667, U.S.C.C.S. at 1199-1200 (1945).

This proclamation explicity referred only to the mineral resources of the continental shelf. At the same time, the President issued a separate proclamation[10] expressing this nation's concern with inadequate management of the fisheries resources near our coasts, and announcing that

> the government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to coasts of the United States where fishing activities have been or in the future may be developed and maintained on a substantial scale.

This proclamation merely announced this principle, however, and did not establish any such fisheries conservation zones. It was not until 1966 that any step of this sort was taken. In that year Congress passed the Contiguous Fisheries Zone Act, 16 U.S.C. Sections 1092-94, which established a 12-mile zone within which the United States exercises "the same exclusive rights with respect to fisheries in the zone as it has in its territorial sea . . . ."[11] Except as modified by treaty, the United States' jurisdiction over fisheries remains at this point today,[12] despite increasing calls for establishment of a 200-mile fisheries zone.

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10. Proclamation No. 2668, U.S.C.C.S. at 1200-01 (1945).

11. Thus by the Bartlett Act, 16 U.S.C. Sections 1081-86, the exclusion of foreign vessels from our territorial sea was extended to the 12-mile zone as well.

12. See discussion at p. 13, infra, on the extent to which the Outer Continental Shelf Lands Act applies to organic resources.

Meanwhile, before 1947, there had been a general assumption that the seaward boundaries of the coastal states extended to the outer edges of the three-mile limit. In 1947, the United States Supreme Court, in United States v. California (First California),[13] reversed this assumption by ruling that the states' authority ends at the low-water mark, and that from that point to the three-mile limit the "territorial sea" was an area of exclusive federal jurisdiction. (The dispute in that case centered upon the issue of the proprietary exploitation of undersea oil reserves, but the court's opinion was essentially premised upon a recognition of the need for a unified national authority in an area so inextricably subject to defense and international relations considerations; it was concluded that the United States' paramount responsibilities thereto gave rise to its paramount authority in the area.)

The result of the First California case was reversed by Congress in 1953 when it passed the Submerged Lands Act (SLA), 43 U.S.C. Sections 1301-15.[14] This act confirmed proprietary title in each state to the lands and resources, including fish, beneath and within the navigable waters of the state, and placed the outer boundaries of the coastal states at the seaward edge of the three-mile limit.

In the same session, Congress also passed the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. Sections 1331-43, which began as an amendment to the Submerged Lands Act but was ultimately separated from it before its passage

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13. 332 U.S. 19, 91 L. Ed. 1889, 67 S. Ct. 1658 (1946).

14. This act was made applicable to Alaska by the Statehood Act, 72 Stat. 339.

as a separate act. For purposes of this appeal, the heart of the OCSLA is Section 1332, which reads:

> (a) It is declared to be the policy of the United States that the subsoil and seabed of the outer continental shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.
>
> (b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer continental shelf and the right to navigation and fishing therein shall not be affected.

Just exatly what the phrase "subsoil and seabed" includes is a major question in this case. The Submerged Lands Act uses the phrase "lads beneath navigable waters . . . and the natural resources within such lands and waters" (43 U.S.C. Section 1311 (a)), and the term "natural resources" is defined to include fish and crabs (43 U.S.C. Section 1301(e)). The Outer Continental Shelf Lands Act, however, does not refer to organic resources, nor does it define clearly its scope with respect to such resources.

Also of relevance in this case are the numerous treaties regarding North Pacific fisheries. We take note of the fact that there are now eleven such treaties, affecting species which amount for 96 per cent of the value of the manufactured products of Alaska's commercial fisheries.[15] The two treaties which are most relevant here are the United States - U.S.S.R. King Crab Agreement and the United States Japan Contiguous Fishery Zone

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15. E. Wunnicke, "The Legal Framework Governing Alaska Fisheries", Alaska Fisheries Policy (1972) p. 237.

Agreement. Both of these regulate crabbing by Japan and the Soviet Union in that portion of the Bering Sea east of the United States - Russia Convention Line of 1867. Although the Russians are not now exercising their rights to a limited crab season under the agreement, the Japanese apparently do.

Although a number of bills have been introduced in Congress to create a comprehensive fisheries management scheme for the Outer Continental Shelf, none has passed to date.

FEDERAL EXCLUSIVITY AND FEDERAL PRE-EMPTION

The appellees' first legal contention, broadly stated, is that fishery regulation in the sea beyond the three-mile limit is constitutionally an area of exclusive federal authority, thus Alaska is barred from legislating therein. This contention subsumes two quite distinct constitutional theories: federal exclusivity and federal pre-emption. According to the former doctrine, certain provisions of the federal constitution which delegate powers to the central government implicitly restrict the police powers of the states and thereby carve out areas which can be regulated, if at all, only by the federal government. The concept is one of exclusive federal domains.

The doctrine of federal pre-emption also deals with the allocation of state and federal responsibilities, but it speaks to those situations where there is recognized concurrent state and federal authority. It holds that when Congress has exercised its regulatory authority over a particular subject in manner to indicate an intention to deal fully and exclusively therewith, all state regulation in that particular field must yield. The basic premise is the supremacy of federal law.

A. *Federal Exclusivity*

Appellees' contention that fishery regulation beyond traditional territorial waters is an exclusive federal domain derives principally from the federal government's authority to regulate interstate and foreign commerce[16] and to manage foreign relations.[17] It is quite well established that the commerce clause of the federal constitution serves two distinct functions: to confer on the national government authority concurrent with the states over matters of interstate and foreign commerce, and, even in the absence of federal legislation, to prohibit state regulation in certain areas of commerce that are "national" in nature. The prohibitory force of the commerce clause was established in the great "Cooley compromise"[18] and has been reaffirmed countless times since that historic decision.[19] Of course, it is today evident that not all that Congress can reach under the sweeping authority of the commerce clause is forbidden to the states. In delineating the smaller arena of exclusive federal concern, the Supreme Court has built upon the touchstone suggested in Cooley:

> Whatever subjects of this power are in their nature national, or admit only of

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16. U. S. Const., art. I, Section 8.

17. U. S. Const., art. I, Section 8, art. II Section 1, art. 6.

18. Cooley v. Board of Wardens, 53 U.S. (12 How.) 229, 13 L. Ed. 996 (1852).

19. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959); H. P. Hood & Sons v. DuMond, 336 U.S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949); Edwards v. California, 314 U.S. 160, 86 L. Ed. 119, 62 S. Ct. 164 (1941).

> one uniform system, or plan of regulations, may justly be said to be of such a nature as to reuire exclusive legislation by Congress.[20]

The difficulty with the criterion has been in its application, for few aspects of commerce are inherently either wholly "national" or wholly "local" in character. Although it has used a variety of catchphrases and labels,[21] the Supreme Court in modern times has recognized that the issue is essentially a reconciliation of conflicting claims of state and national power, which can be attained only by an appraisal of the competing state and national interests at stake.[22]

> Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, State action is struck down. If the activity is one of predominantly local interest, State action is sustained. More accurately, the question is whether the State interest

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20. 53 U.S. (12 How.) 299, 319, 13 L. Ed. 996, 1005 (1852).

21. E.g., "direct" burdens on interstate commerce are forbidden, while "indirect" burdens are permissible. Hall v. DeCuir, 95 U.S. 485, 24 L. Ed. 547 (1878); "undue" burdens are prohibited, Dean Milk Co. v. Madison, 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951); "material" burdens are violative of the commerce clause, Real Silk Hosiery Mills v. Portlasnd, 268 U.S. 325, 45 S. Ct. 525, 69 L. Ed. 982 (1925); "unreasonable" burdens are forbidden, International Milling Co. v. Columbia Transp. Co., 292 U.S. 511, 78 L. Ed. 1396, 54 S. Ct. 797 (1934).

22. Southern Pacific Co. v. Arizona, 325 U.S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515 (1945).

is outweighed by a national interest in the unhampered operation of interstate commerce.[23]

The national interest has consistently been held to predominate in two instances: when a state regulates in an area where nationally uniform regulations are truly necessary,[24] and when state regulations discriminate against out-of-state goods or manufacturers, threatening to provoke retaliatory restrictions inimical to national commerce.[25] Under these circumstances, the commerce clause invalidates the purported state legislation.

The Supreme Court has expressly declined to distinguish between state regulations of interstate commerce and regulation dealing with foreign commerce.[26] In either case the prohibitory reach of the commerce clause is determined by the same analysis of competing state and federal claims.[27]

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23. California v. Zook, 336 U.S. 725, 728, 93 L. Ed. 1005, 1008, 69 S. Ct. 841, 843 (1949).

24. E.g., Bibb v. Navajo Freight Lines, Inc., 79 S. Ct. 962, 359 U.S. 520, 3 L. Ed. 1003 (1959); Southern L. Ed. 1915 (1945).

25. E.g., Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 79 L. Ed. 1032, 55 S. Ct. 497 (1934).

26. Bob-Lo Excursion Co. v. Michigan 333 U.S. 28, 38-40, 92 L. Ed. 455, 464, 68 S. Ct. 358, 363-64 (1948).

27. Hale v. Bimco Trading, Inc., 306 U.S. 375, 59 S. Ct. 526, 83 L. Ed. 771 (1939); Kelly v. Washington, 302 U.S. 1, 82 L. Ed. 3, 58 S. Ct. 87 (1937); Bayside Fish Flour Co. v. Genry, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936); New York ex rel. Silz v. Hesterberg, 211 U.S. 31, 53 L. Ed. 75, 29 S. Ct. 10 (1908).

Applying these principles, this court must decide whether the commerce clause renders the states powerless to regulate fisheries in waters beyond the three-mile limit. The potential national interest at stake appears multi-faceted. As to the need for national uniformity of regulation, it would appear doubtful that crabbing in the Bering Sea is of such a nature as to require such uniformity. In its brief as Amicus Curiae in this case, the United States government makes no claim for the exigency of federal regulation. Indeed, other federal documents indicate that local regulation might in fact be more efficacious. Specifically, a 1974 report commissioned and distributed by the Department of Commerce evaluates the prospect of federal regulation of fishing beyond state territorial waters. It concludes:

> A basic assumption about fisheries regulation is that the substantial differences in both the kinds of fish caught and the fishing effort itself among the several states render a uniform approach to fisheries regulation throughout the United States inadvisable and self-defeating ....
>
> ...
>
> [A] single regulatory body with jurisdiction over the [territorial and extra-territorial seas] would provide the most efficient and effective regulation and management of the fisheries resources of the area. It is submitted that either the states or regional commissions, with their substantial experience in regulating coastal fishing in virtually all its aspects and with their superior knowledge of the problems peculiar to fisheries

resources off their own coasts should be that single regulatory body.[28]

The continued absention from federal regulation of fishing in territorial waters, despite constitutional power to do so,[29] confirms the wisdom of the traditional approach of loca, non-uniform management of fisheries resources.

The Supreme Court has held that a problem may be national in scope if lan attempted local solution will invite retaliation by sister states.[30] Moreover, a problem may be national if it directly and significantly affects more than one state.[31] While it is clear that Alaska is the state most directly affected by the conduct of Bering Sea fishermen, there are large numbers of Washington crab fishermen and processors, for example--like most of the appellees here--who depend on the resources of this area. It may consequently be recognized that at least some other states have an interest in that fishery. However, the mere

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28. North Carolina University, State and Federal Jurisdictional Conflicts in the Regulation of United States Coastal Waters, at 12-13 (1974).

29. Browning, Some Aspects of State and Federal Jurisdiction in the Marine Environment, at 139-40 (1968).

30. Morgan v. Virginia, 328 U.S. 373, 90 L. Ed. 1317, 66 S. Ct. 1050 (1946); Edwards v. California, 314 U.S. 160, 86 L. Ed. 119, 32 S. Ct. 164 (1941); Hall v. DeCuir, 95 U.S. 485, 24 L. Ed. 547 (1878).

31. Buck v. Kuykendall, 267, U.S. 307, 69 L. Ed. 623, 45 S. Ct. 324 (1925); Hall v. DeCuir, 95 U.S. 485, 24 L. Ed. 547 (1878).

fact that crabbing in the Bering Sea represents commerce among and between several states does not preclude Alaska from acting. It is clear that " ... there is a residium of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it ... "[32] Moreover, there is absolutely nothing to suggest that these regulations are either by their terms or in their enforcement discriminatory against non-Alaskans. Assuming for the moment that the state does have jurisdiction over the entire crabbing field, there is no reason to think that exercise of this jurisdiction in a patently neutral fashion will provoke retaliatory restrictions by Alaska's sister states.

Appellees also contend that the national interest in unfettered international commerce may be jeopardized by Alaska's regulations. On their face, these regulations apply to all fishermen, not just Americans. Thus, there is a potential for conflict with United States agreements with foreign nations concerning fishing practices on the high seas, for example the Soviet Bilateral agreements with the United States. The federal government is also currently concerned with the unilaterail extension to 200 miles of maritime boudaries by nations such as Peru, thus restricting access by United States fishermen to traditional anchovy and tuna grounds. Enforcement of the Alaskan regulations against foreign nationals could be taken as just such a unilateral step by the United States, inviting reciprocal moves by other nations.

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32. Southern Pacific Co. v. Arizona, 325 U.S. 761, 767, 65 S. Ct. 1515, 1519, 89 L. Ed. 1915, 1923 (1945).

The state's response is that these regulations, being aimed at United States fishermen, will not be enforced against foreign nationals. See Hjelle v. Brooks.[33] Indeed, to the extent these regulations are inconsistent with fishing rights granted to foreign nations pursuant to the treaty power, the Supremacy Clause dictates that they must yield. The state does not dispute this, but urges that no conflict is apparent or even probable in view of the fact that these regulations were promulgated at the urging of federal agencies to implement their treaties.[34]

The possible ramifications of these regulations or international commerce appear extremely speculative at this point. We feel that, absent some further showing of impact, this aspect of the national interest should be given minimal weight. The threat of conflict with international agreements or foreign rights is " ... so remote that it is hardly more than conceivable." Bob-Lo Excursion Co. v. Michigan.[35]

The court turns next to a consideration of the state interest in regulating the harvesting of crab in the Bering Sea. Fishing now constitutes the largest single industry in Alaska and

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33. 377 F. Supp. 430, 438 (D. Alaska 1974).

34. Reply Brief of Appellant, No. 2435, at 15.

35. 333 U.S. 28, 37, 92 L. Ed. 455, 463, 68 S. Ct. 358, 363 (1948). See also Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 447, 4 L. Ed. 2d 852, 858, 80S. Cg. 813, 818 (1960); Ghera v. Department of Fish and Game, No. 47823 SAW at 8 n. 1 (N.D. Cal. 1973) [unpublished opinion reprinted in Appendix to Appellant's Brief in No. 2435].

crabbing is a substantial portion of that activity.[36] Most of the services which support the crabbing fleet are provided in Alaskan harbors, and much of the processing and canning of the harvested resource is done in factories throughout the state. Exhaustion of this marine resource would have a devastating impact on employment in this state which still has a relatively narrow industrial base. Particularly crippled would be those villages along our shores whose sole livelihood comes from the sea.

Moreover, Alaskan king crab is an important food source for the people of this state. The commerce clause has consistently been interpreted to permit state regulations which safeguard local food sources, for example, quarantine laws.[37] In sustaining a California regulation governing the harvesting of avocados, the Supreme Court said:

> Specifically, the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern.[38]

This court concludes that these regulations deal with a problem particularly local in import and in a way fully compatible with the commerce clause. We derive support for this conclusion

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36. See Hjelle v. Brooks, 377 F. Supp. 430, 443 (D. Alaska 1974) [concurring opinion].

37. Rasmussen v. Idaho, 181 U.S. 198, 45 L. Ed. 820, 21 S. Ct. 594 (1901); Morgan's R.R. and Steamship Co. v. Louisiana, 118 U.S. 455, 6 S. Ct. 1114, 30 L. Ed. 237 (1886).

38. Florida Avocado Growers v. Paul, 373 U.S. 132, 244, 10 L. Ed. 2d 248, 258, 83A S. Ct. 1210, 1218 (1963).

from the Supreme Court decision in Alaska v. Arctic Maid,[39] in which the court considered the constitutionality of an Alaskan occupation tax on freezer ships stationed beyond territorial waters but receiving catches taken within the three-mile limit. The issue there was whether the state was attempting to tax an integral link of interstate commerce, in violation of the implicit restrictions of the commerce clause. In holding that the territorial tax did not contravene the constitution, Justice Douglas spoke with language of continuing force:

> The process of gathering fish either through the catcher boats that are part of respondent's fleet or through independent operators is a "local activity" ... in a vivid sense of the term. Here ... the market for the product obtained slocally is interstate, the taking being a step in a process leading to an interstate market. ... [T]he local product is promptly loaded for interstate shipment. But ... there is a preliminary local business being conducted ... an occupation made up of a series of local activities which the State can constitutionally reach.[40]

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39. 366 U.S. 199, 6 L. Ed. 2d 227, 81A S. Ct. 929 (1961).

40. 366 U.S. 199, 203-04, 6 L. Ed. 2d 227, 230-31, 81 S. Ct. 929, 931-32 (1961). See also Toomer v. Witsell, 334 U.S. 385, 92 L. Ed. 1460, 68 S. Ct. 1156 (1948); Oliver Iron Min. Co. v. Lord, 262 U.S. 172, 67 L. Ed. 929, 43 S. Ct. 526 (1923).

We conclude that the commerce clause does not render regulation of fisheries in the Bering Sea the exclusive domain of the federal government.

We turn next to the contention that the challenged fishery regulations represent state intrusion into the field of foreign affairs, an exclusive federal domain. The Constitution does not in so many words entrust to the national government the power to conduct external relations. Instead, it parcels out certain aspects of the foreign affairs power among the political departments and imposed certain prohibitions on the states. From these constitutional references and from the fundamental premises of our system of federalism flows one of our most basic principles of government:

> Governmental power over external affairs is not distributed, but is vested exclusively in the national government.[41]

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41. United States v. Belmont, 301 U.S. 324, 81 L. Ed. 1134, 57 S. Ct. 758 (1937). See also Hines v. Davidowitz, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 81 L. Ed. 255, 57 S. Ct. 217 (1936). One commentator has explained:

> As a sovereign power possessed by the nation, the power over foreign affairs is inherent, exclusive, and plenary. It is inherent, since ... it does not depend for its existence upon the affirmative grants of the Constitution. It is exclusive in the Federal Government, both because of express prohibition on the states in this field and because only the

A concomitant principle is that a state can not enact legislation which constitutes " ... an instrusion by the state into the field of foreign affairs which the Constitution entrusts to the President and the Congress," and the Supreme Court has invalidated an Oregon statute on that ground.[42] However, the states in the management of their affairs must necessarily impinge on foreign relations in a myriad of ways;[43] the precise delineation of this arena of exclusive federal domain remains largely unexplored.

In Zschernig v. Miller,[44] the Supreme Court

> Union is vested with the attributes of external sovereignty. For national purposes, embracing our relation with foreign nations, we are but one people, one nation, one power.

2 B. Schwartz, A Commentary on the Constitution of the United States, Section 206, at 97-98 (1963).

42. Zschernig v. Miller, 389 U.S. 429, 432, 88 S. Ct. 664, 666, 19 L. Ed. 2d 683, 687 (1968). But see Gorun v. Fall, 393 U.S. 398, 89 S. Ct. 678, 21 L. Ed. 2d 628 (1968). See generally, Marer, The Bases and Range of Federal Common Law on Private International Matters, 5 Vand. J. Transnational L. 133 (1971).

43. E.g., Clark v. Allen, 331 U.S. 503, 91 L. Ed. 1633, 67 S. Ct. 1431 (1947). See generally L. Henken, Foreign Affairs and the Constitution, 238 (1972).

44. 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968). See also Henderson v. New York, 29 U.S. 259, 23 L. Ed. 5434 (1876); The Federalist Papers, Nos. 3, 4, 5, 42, and 80; Bethlehem Steel

gave great weight to the fact that the challenged statute had more than " ... some incidental or indirect effect in foreign countries ... " it had " ... great potential for disruption or embarrassment" of our foreign policies. This suggests to us that an analysis not unlike that under the commerce clause is appropriate. Certain state infringements on foreign affairs are forbidden because national uniformity is required or because they discriminate against or unduly burden our foreign relations. Generally, the inquiry will balance the state's interest in the regulation against its impact on United States foreign relations.[45]

Under this analysis the crabbing regulations at issue cannot be said to intrude upon the nation's foreign relations. Alaska does not seek to discriminate against foreign fishing fleets; indeed, if anything, it favors foreign nationals by refraining from enforcing the regulations against such parties. The potential conflict is at best only speculative and indirect at the present time. Our analysis of the state's jurisdiction, infra, suggests that the state may never possess authority over foreign fleets in the crabbing area, hence the threat of international imbroglio appears quite attentuated. For these reasons this court concludes that the crabbing regulations are not violative of the national government's exclusive prerogatives in the field of foreign affairs.

Finally, in considering the issue of federal exclusivity, this court must consider

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Corp. v. Board of Commissioners, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (Cal. App. 1969).

45. See L. Henken, supra note 26, at 241.

the "submerged land cases,"[46] relied on by appellees Uri, et. al., and Kaldestad.[47] The Supreme Court in United States v. California (First California)[48] held that the submerged lands within the three-mile belt were an area of paramount federal authority. The decision was in large part based upon the rationale that concerns of national defense, foreign affairs, and international commerce require that result. The court observed that

> ... insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts

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46. United States v. Main, __ U.S. ___, 95 S. Ct. 1155, 43 L. Ed. 2d 363 (1975); United States v. California (Second California), 381 U.S. 139, 85 S. Ct. 1401, 14 L. Ed. 2d 296 (1965); United States v. Florida, 363 U.S. 121, 80 S. Ct. 461, 4 L. Ed. 2d 1096 (1960); United States v. Louisiana, 80 S. Ct. 961, 363 U. S. 1, 4 L. Ed. 2d 1025 (1960); United States v. Texas, 339 U.S. 707, 70 S. Ct. 918, 94 L. Ed. 221 (1950); United States v. Louisiana, 339 U.S. 699, 70 S. Ct. 914, 94 L. Ed. 1216 (1950); United States v. California (First California), 332 U.S. 19, 67 S. Ct. 1658, 91 L. Ed. 1889 (1947).

47. Brief of appellees Uri et al. and Kaldestad, Nos. 2435, 2444, at 8-10.

48. 332 U.S. 19, 67 S. Ct. 1658, 91 L. Ed. 1877 (1897).

> from it, is a question for considerations among nations as such, and not their separate governmental units.[49]

In 1950, in response to a claim by Louisiana of territorial jurisdiction as far as 27 miles from shore, the Court in United States v. Louisiana held that First California controlled and noted that

> ... If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows a fortiori that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so.[50]

As mentioned, the result in First California was negatived by the Submerged Lands Act, but that act did not purport to effect rights beyond the three-mile limit of the territorial sea. Consequently, the rationale of the First California and Louisiana cases is still valid as applied to areas seaward of the territorial belt. And while those decisions never explicitly refer to the living resources of the oceans (the motivation behind both cases lay in control of exploitation of mineral resources, particularly oil), appellees argue that the logic applies with equal force to the use of the surface and waters for fishing purposes as to use of the seabed and subsoil for

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49. Id. at 35, 91 L. Ed. at 1897, 67 S. Ct. at 1666-67.

50. 339 U.S. 699, 705, 70 S. Ct. 914, 917, 94 L. Ed. 1216, 1220 (1950).

mineral exploitation: in both instances, regulation by individual states could conflict with federal activities in the areas of national defense, foreign affairs, and international commerce.[51]

The First California and Louisiana decisions therefore stand among other things for the principle that the federal government has paramount

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51. That the logic of these cases is still alive is apparent from the United States Supreme Court's recent decision in United States v. Maine, __ U.S. ___, 95 S. Ct. 1155, 43 L. Ed. 2d 363 (1975). Maine and the other Atlantic coast states claimed sovereignty rights over the seabed and subsoil to the outer edge of the continental shelf, based on certain colonial grants. The court rejected these claims and affirmed a Master's Report that as a matter of "purely legal principle ... the Constitution ... allotted to the federal Government jurisdiction over foreign commerce, foreign affairs and national defense," and that "it necessarily follows, as a matter of constitutional law, that as attributers of these external sovereign powers of the federal government has paramount rights in the marginal sea." 43 L. Ed. 2d at 369. Although this decision specifically related to claims to the "seabed," and the underlying concern was again mineral resources, the court at one point reinterprets First California rights over the ocean waters and their seabed were vested in the Federal Government." 43 L. Ed. 2d at 368 (emphasis added). While it may be error to assume from this that the court consciously considered the problem of water-borne resources and so applied this logic to them, it may however be taken to indicate that the court did not consciously draw a distinction between seabed and seawaters and apply their logic only to the former.

authority over the seas and submerged lands on both sides of the traditional three-mile limit; with this the state does not contest. However, these decisions do not establish that the federal government has exclusive authority in these seas. This much is made clear by Toomer v. Witsell,[52] wherein the court said that state regulation of fishing within territorial waters in the absence of conflicting federal legislation was valid so long as it comported with the applicable constitutional provisions. In Skiriotes v. Florida,[53] certain Florida regulations governing the taking of sponges beyond territorial waters were also upheld.

Thus, it is clear that in the absence of an exercise of the federal government's paramount powers over fishing, the states enjoy some regulatory prerogatives. It is the question whether the federal government has in fact exercised those powers to which we next turn.

B. Federal Pre-emption

Generally state laws must yield when they are in conflict with federal law or when Congress has indicated an intent to occupy a particular field exclusively. In the case of crabbing in the Bering Sea, we are persuaded that there is no direct conflict (other than the potential problems noted supra) with federal regulations, because there is simply no material federal regulation of this activity; there is no evidence of federal regulatory efforts indicative of federal intent to pre-empt.[54] We must consequently look to whether

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52. 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1475 (1948).

53. 313 U.S. 69, 61 S. Ct. 924, 85 L. Ed. 1193 (1941).

54. Cf., Burbank v. Lockheed Air Terminal, 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973).

there is elsewhere any indication of congressional intent that only the federal government should regulate this activity.

The fact that federal law occupies only a part of a field ordinarily leaves the states free to cover the other aspects of it.[55] A partial occupation of the field by the federal government should not give rise to an inference of congressional intent to pre-empt; such an inference from a partial occupation is permissible only if the federal law is in actual conflict with the law of the state.[56] Absent actual direct conflict, there must be clear evidence of congressional intent to pre-empt the field.[57]

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55. Skiriotes v. Florida, 313 U.S. 69, 75, 61 S. Ct. 924, 928, 85 L. Ed. 1193, 1199, (1941); Savage v. Jones, 225 U.S. 501, 32 S. Ct. 715, 56 L. Ed. 1182; In Re Squires, 44 A.2d 133 (Vt. 1945).

56. Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960).

57. Head v. New Mexico Bd. of Examiners, 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963); Schwartz v. Texas, 344 U.S. 199, 73 S. Ct. 232, 97 L. Ed. 231 (1952); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963). See Kelly v. Washington, 302 U.S. 1, 58 S. Ct. 87, 82 L. Ed. 2d 3 (1937); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 31 N.W.2d 477 (Neb. 1948); California v. Zook, 336 U.S. 725, 69 S. Ct. 841, 93 L. Ed. 1005 (1948); Allen-Bradley Local v. Wisconsin Employment Relations Bd., 315 U.S. 740, 62 S. Ct. 820 86 L. Ed. 1154 (1942).

In this case appellees primarily base their argument of federal pre-emption of crabbing regulation beyond the three-limit on the terms of the Outer Continental Shelf Lands Act,[58] as elucidated by its legislative history and by several other federal acts and international agreements. OSCLA extended federal jurisdiction over the "subsoil and seabed" of the continental shelf beyond the three-mile territorial zone.

In its relevant provision the Act provides:

> It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter. (Emphasis added)[59]

In 43 U.S.C. Section 1333(e)(2), the Act also provides for the adoption of state law as "surrogate federal law"[60] to govern the Outer Continental Shelf when not in conflict with other federal measures. However, an important qualification was appended to this provision:

> The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the

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58. 43 U.S.C. Sections 1331-43 (1953).

59. 43 U.S.C. Section 1332(a) (1953).

60. Rodrigue v. Aetna Cas. Co., 395 U.S. 353, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969); Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971).

seabed and subsoil of the outer Continental Shelf or the property and natural resources thereof or the revenues therefrom. (Emphasis added)[61]

Appellee contends that in the OSCLA Congress intended to establish federal pre-emption of all the natural resources of the outer shelf, including crab. As noted earlier, while the Submerged Lands Act refers to and provides a definition of the "natural resources" which explicitly includes crabs, the OCSLA lacks any similar definitional identification of the natural resources of the subsoil and seabed. It is urged that we refer to the definition in the Submerged Lands Act as evidence that Congress intended to include crabs within the terms of the OCSLA.

It is unquestioned that, although they were closely related in time and origin, the SLA and the OCSLA constitute separate acts of Congress. Thus, one cannot argue that the SLA definition of "natural resources" is directly applicable to the terms of the OCSLA. However, the general rule is that a statute in pari materia with a subsequent, but approximately contemporaneous, measure is a proper source of evidence of legislative intent in that second measure.[62] In the words of one authority,

> . . . [I]f it is natural and reasonable to think that members of the legislature . . . would think about another statute and have their impressions derived from it influence their understanding of the act whose effect is in question, then a court called upon to construe the act in question should also

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61. 43 U.S.C. Section 1333(a)(3) (1953).

62. D. Sands, Sutherland Statutory Construction, Section 51.01 (4th Ed. 1972).

> allow its understanding of it to be influenced by impressions derived from the statute.[63]

We are not convinced that the SLA would never be of assistance in construing the provisions of the OCSLA. In this case, however, the SLA definition of natural resource is of no help. We may assume, as the appellees claim, that crab and other fish are part of the natural resources which lie beyond the state's territorial waters. The OCSLA does not by its terms preclude the state from asserting jurisdiction over all the natural resources which are byond its boundaries. Rather, the act merely provides that no state shall have jurisdiction over the "subsoil" and "seabed" of the outer continental shelf, and the "natural resources thereof." 43 U.S.C. Section 1333(a)(3). (Emphasis added) The "thereof" reference limits the act's scope to the natural resources which are part and parcel of the outer shelf.[64] Thus, the issue properly before us is whether crabs are a resource of the subsoil and seabed, as opposed to a resource of the superadjacent waters.

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63. Id. at Section 51.03.

64. See also 43 U.S.C. Section 1333(a)(1) (1953), which provides in part:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom. . . . (Emphasis added)

Appellees contend that federal legislation and international agreements subsequent to passage of the OCSLA evidence Congress' intent that sedentary species of marine life, such as crabs, were among the resources of the seabed over which it was assuming exclusive jurisdiction. The 1958 Convention on the Continental Shelf, of which the United States is a signatory, considers "sedentary species" to be resources of the continental shelf, thus giving to the coastal nation "sovereign rights" for the exploitation of that natural resource. That crabs were intended to be in this category is confirmed by the 1973 Agreement between the United States and the USSR on king and tanner crabs, which explicitly lists crabs as "natural resources of the continental shelf" for purposes of the 1958 Convention's placement of sovereign rights in the coastal nation. As evidence of Congressional intent, however, these documents are of little persuasive force. The Convention was drafted by parties other than Congress and only establishes a claim of United States jurisdiction over sedentary species; it says nothing with respect to whether in our internal structure of government that jurisdiction is exercised at the federal or state level. The 1973 Agreement was an executive agreement not reviewed by Congress.

Appellees also point to the Bartlett Act,[65] passed eleven years after the OCSLA. This legislation was the means by which the United States brought into foce against foreign nationals the rights it obtained pursuant to the 1958 Convention, particularly the right to control or prohibit the taking of fishery resources of the continental shelf. In 16 U.S.C. Section 1081 (1970), Congress has forbidden foreign nationals from taking crabs and other sedentary shelf resources except pursuant to international agreement. This foreign policy measure is hardly indicative that a decade

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65. 16 U.S.C. Sections 1081-86 (1970).

earlier Congress had intended to realign domestic responsibilities so to pre-empt further state regulation of sedentary marine life.

Our review of appellees' arguments does not persuade us that the OCSLA was intended as an exercise of federal pre-emption over both seabed mineral resources and sedentary marine species. Rather, this court is of the view that the actual distinction intended was between the inorganic resources of the subsoil and seabed (principally oil), which were thenceforth to be the exclusive domain of the federal government, and organic marine life resources, which were not affected by the act. We draw support for this conclusion from a variety of sources. First, though not totally unambiguous, the legislative history of OCSLA evidences Congress' true concern:

> The purposes of S. 1901, as amended, is to assert the exclusive jurisdiction and control of the Federal Government of the United States over the seabed and subsoil of the outer Continental Shelf, and to provide for the development of its vast mineral resources. [Emphasis added][66]

Second, the Act expressly disclaims any effect on fishing and navigation rights.

> This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental

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66. Sen. Rep. No. 411, 83rd Cong., 1st Sess. (1953). See also remarks of Senator Douglas, 99 Cong. Rec. at 2868 (1953):

> We are not particularly interested in kelp, or shrimp or oysters, those are sideshows. The question is as to oil and gas.

> Shelf and the right to navigation and fishing therein shall not be affected.[67] [Emphasis added]

The origins of this disclaimer reveal exactly what it was intended to encompass. Senator Cordon, the floor manager of the OCSLA, remarked with reference to this provision ". . . that we are excepting from the operation of this act all marine life above the land itself beneath the seas."[68] [Emphasis added] "Fishing" in this context has traditionally been understood to include the taking of both free swimming and sedentary forms of marine life.[69]

Third, we must recall that this legislation was passed only a decade after the Supreme Court decision on Skiriotes v. Florida.[70] If appellees are correct in asserting that the act precludes a state from regulating extraterritorial fishing for sedentary marine life, the act would then preclude a state from regulating fishing by its own citizens

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67. 43 U.S.C. Section 1332(b) (1953).

68. Sen. Rep. No. 411, 83rd Cong., 1st Sess. (1953).

69. See e.g., the treatment of taking sponges as "fishing" in Skiriotes. That Congress also used the term in the broader sense is evident from the legislative history. See Hearings on H.R. 5991 and 5992 Before a Subcomm. of the House Comm. on the Judiciary, 81st Cong., 1st Sess. at 190 (1949); Hearings on S.J. Res. 20 Before the Senate Comm. on Int. and Ins. Affairs, 82d Cong., 1st Sess. at 50-54 (1951); Hearings on S. 155 Before the Senate Comm. on Int. and Ins. Affairs, 81st Cong., 1st Sess. at 245, 391, 414 (1949).

70. 211 U.S. 69, 61 S. Ct. 924, 85 L. Ed. 1193 (1941).

on the high seas. In that event, the act would have to be considered to have overruled the Skiriotes decision. However, nothing whatever in the act or its legislative history suggests such a Congressional design, and we are unwilling to infer that Congress would have acted to that end without making its intention known. A far more plausible interpretation is that Congress did not believe that the OCSLA in any manner affected the state's rights to regulate the taking of sponges, crabs, and other forms of sedentary and nonsedentary marine life.

Fourth, the few authorities which have considered the reach of OCSLA in extra-territorial waters seem to confirm that the distinction between mineral and marine resources is central to the statutory scheme.[71] In Guess v. Reed, for example, the court dealt with the question of whether a Louisiana statute could be applied in an action resulting from a death after a helicopter crashed in the sea beyond that state's territorial limits. The court said the OCSLA did not apply because

> [t]he Continental Shelf Act was enacted for the purpose, primarily of asserting ownership of and jurisdiction over the minerals in and under the Continental Shelf. Jurisdiction was asserted over "the subsoil and seabed" of the outer Continental Shelf. 43 U.S.C.A. Section 1332(a). It is only for "that portion of the subsoil and seabed of the outer continental shelf, and artificial islands and fixed structures erected thereon" that the state law applies. 43 U.S.C.A. Section 1333(a)(2). This does not include

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71. 290 F.2d 622 (5th Cir. 19610, cert. denied 368 U.S. 953, 82 S. Ct. 394, 7 L. Ed. 2d 388.

the sea above the subsoil and seabed and does not include the air above the sea.[72]

Somewhat more troublesome is United States v. Ray,[73] a case in which two private developers planned to build on coral reefs four and one-half miles off the coast of Florida and maintain their projects as separate nations. The United States sued for an injunction, claiming control over the reefs, and the Court of Appeals for the Fifth Circuit agreed. It affirmed the lower court's finding that the skeletal coral remains constituted part of the "seabed," as that term is used in the OCSLA. However, the court also relied on terms in the Geneva Convention on the Continental Shelf and the Submerged Lands Act to support its claims. As we have explained. those provisions are not germane to the question on whether Congress has exercised its constitutional power to exclude the states from management of sedentary marine life byond the three-mile limit. While we are in agreement with the result in Ray, we do not subscribe to the method of legislative analysis employed therein.

There is a final indication that Congress did not by the OCSLA intend to pre-empt ocean fisheries regulations by the states. Currently pending in Congress are bills[74] to enact the "High Seas Fisheries Conservation Act of 1973." These measures explicitly authorize agencies of the federal government to regulate activites

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72. 290 F. 2d at 625. See also Employers Mut. Cas. Co. v. Samuels, 407 S.W.2d 839 (Tex. Ct. Civ. App. 1966); cf Hjelle v. Brooks, 377 F. Supp. 430, 439-40 n. 4 (D. Alaska 1974).

73. 423 F. 2d 16 (5th Cir. 1970).

74. H.R. 4760, H.R. 4756, 93rd Cong., 1st Sess. (1973).

of American citizens in ocean fisheries. Proponents are of the view that this is the first occasion on which it has attempted to exercise federal control over the taking of fishery resources.[75] This strongly suggests to us that OCSLA did not have the pre-emptive intent which is ascribed to it by appellees.

In any event, we are ultimately persuaded that under the circumstances the absence of any clear indication the federal exclusivity or pre-emption in this area is significant. The issue as raised in this appeal is unquestionably of crucial import, for other states as well as our own, and in view of the closeness of the question -- of the considerable merit we find in the arguments presented on both sides -- this is a case uniquely appropriate for honoring the presumption of constitutionality and validity which adheres to the acts of our legislature. This court acknowledges its duty not to declare statutes unconstitutional unless such repugnancy clearly appears.[76] We moreover acknowledge that our decision today may provide the most effective vehicle for assuring that this matter will at last receive the prompt and definitive attention by the final arbiters of such questions -- the Congress or the Supreme Court of the United States.

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75. See, e.g., Statement of Dr. Robert M. White, Administrator, National Ocedanic and Atmospheric Administration, in Hearings Before the U. S. House Committee on Merchant Marine and Fisheries, Subcommittee on Fisheries and Wildlife Conservation and the Environment, 93rd Cong., 1st Sess. (1973).

76. E.g., United States v. R. & J. Enterprises, 178 F. Supp. 1 (D.C. Alaska 1959); Leege v. Martin, 379 P.2d 447 (Alaska 1963); In Re Paul, 17 Alaska 360 (1957).

STATE FISHERIES JURISDICTION

Having concluded that the doctrines of federal exclusivity and pre-emption are not applicable, and that these regulations are not invalid under Supremacy clause of the Constitution of the United States, we turn now to the question of the extent to which Alaska may extend the reach of its laws and police power beyond the confines of its territorial borders.

The appellees and the United States (appearing as amicus curiae) argue that a state has no legal authority to extend its control over fisheries over any area outside the three-mile limit. They take the position that the cases of Manchester v. Massachusetts[77] and Toomer v. Witsell[78] relied upon by appellants must be read restrictively to provide that a state may exercise power to regulate fisheries only to the limits of its territorial sovereignity.

The appellant and the State of California, as amicus, urge strongly on the other hand that such cases must be construed liberally in order to permit effective fishery management. They propose a theory that the state's "imperium," or "political" jurisdiction, can extend to activities beyond the boundaries of its territory, or "dominium," when there is sufficient nexus between the activities and legitimate state interests -- particularly in the area of the management of migratory fish and game. They argue that not only must the State be able to regulate fishing of all within the three-mile limit, it must be permitted to regulate the fishing of all outside the three-

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77. 139 U.S. 240, 11 S. Ct. 478, 35 L. Ed. 55 (1890).

78. 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948).

mile limit in those zones where there is a definite impact or an integral relationship between control of the fishery resource outside the three-mile limit and inside the three-mile limit. They argue that fishing management is meaningless if fisherman may wait until the particular fishery resource migrates outside the three-mile limit and then may fish without restraint.

While the position of appellant is appealing from a standpoint of effective resource management, the question becomes whether this factor has been recognized by the United States Supreme Court as permitting the extension of state political control.

Each party cites the same cases and draws differing conclusions from the language thereof.[79] We find, however, the language of several to be particularly helpful.

Skiriotes v. Florida[80] is the touchstone for much of the dispute in this area. In Skiriotes, a sponge fisherman, a citizen of Florida, was charged with tking sponges with diving equipment,

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79. Manchester v. Massachusetts, 139 U.S. 240, 11 S. Ct. 478, 35 L. Ed. 551 (1890); Silz v. Hesterburg, 211 U.S. 31, 39 S. Ct. 10, 53 L. Ed. 75 (1908); Bayside Fish Co. v. Gentry, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936); United States v. First California, 332 U.S. 19, 67, S. Ct. 1658, 91 L. Ed. 1889 (1947); Skiriotes v. Florida, 313 U.S. 69, 61 S. Ct. 924, 85 L. Ed. 1198 (1941); Toomer v. Witsell, 324 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948); United States v. Louisiana, 339 U.S. 699, 70 S. Ct. 914, 94 L. Ed. 1216 (1950); United States v. Second California, 381 U.S. 139, 85 S. Ct. 1401, 14 L. Ed. 296 (1965).

80. 313 U.S. 69, 85 L. Ed. 1193, 61 S. Ct. 924 (1941).

as prohibited by state law. There was controversy over whether the incident occurred within or without Florida's territorial waters, however; but the United States Supreme Court said that that question was of no concern, because the state had power to proscribe defendant's activity inside or outside the territorial waters. Specifically, it found that Florida had a legitimate interest in this exercise of the police power, at least as far as it was applied to the territorial waters in the absence of conflicting federal legislation. Then, reasoning by analogy to the principle that a nation may control the activities of its own citizens on the high seas,[81] the court said:

> If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress. (313 U.S. at 77).

A recent development in the Skiriotes line of cases came after Florida passed a statute permitting regulation of fishing activities both within and without the state boundaries.[82] In Felton v. Hodges,[83] Florida conservation officials arrested the appellant for operating crawfish

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81. On Florida's attempts at regulation, and fishing jurisdiction problems in general, see D. Cowan, Era Of Militant Fishing Jurisdiction--A Study of the Florida Territorial Waters Act of 1963, 23 Univ. of Miami L. Rev. 160 (1966).

82. 72 Mich. L. Rev. 1087 (1974); Restatement of Foreign Relations Section 30 (1965).

83. 374 F.2d 337 (5th Cir. 1967).

traps outside the state's territorial limits during the closed season for crawfishing in that state. Felton brought a federal court rights action, claiming the state had no authority to regulate crawfishing beyond its territorial waters and so was denying him due process. The appeals court affirmed a dismissal of his federal court action on the basis of Skiriotes. It said:

> Following the approach dictated by Skiriotes, we must inquire whether Florida has a legitimate interest in controlling the activities which it sought to regulate here. It appears . . . that appellant's crawfish traps were located in a group of reefs adjacent to the Florida Keys, and that the crawfish in this area move freely in and out of Florida's territorial waters, so that any taking of them would clearly have an effect upon the State's conservation efforts. Under these circumstances, we think it apparent that the State has an interest sufficient to enable it to subject appellant, one of its own citizens, to the conservation regulations which it sought to enforce here.[84]

The court also found valid the arrest of Felton beyond the three-mile limit, concluding that this was solely a matter between the state and one of its own citizens: "The arrests to which appellant alleges he was subjected were an integral part of the efforts of the State of Florida to regulate the conduct of one of its own citizens in a manner in which the state clearly had a legitimate interest." The fact that some arrests may have occurred just beyond the three-mile limit did not transmute these enforcement efforts into constitutional violations.

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84. Id. at 339.

In People v. Foretich,[85] the court dealt with a charge of taking fish with illegal gear. Defendants, who were California citizens, claimed to be outside the territorial waters; the State of California said they were within state waters. The court made a ruling on the boundary dispute such that defendants were within the line, but also noted that the statute clearly intended the law to operate in the area of dispute, and held that by Skiriotes it was fully capable of prosecuting its own citizens beyond the territorial limits. There was held to be no conflict with 16 U.S.C. Section 1094, because that section was part of the 12-mile Contiguous Fisheries Zone Act, 16 U.S.C. Section 1091-94, which was not itself a regulation of the fisheries in that zone.

Another case discussing this issue is Gherra v. California Fish and Game Dep't.[86] Certain shrimp fishermen, citizens of California, fished in California shrimp beds until the regular yearly closure, then fished in a shrimp bed beyond the three-mile limit, partly beyond the 12-mile contiguous fisheries zone. During this latter period they operated with Oregon fishing permits, and without reentering California waters. California's closing laws specifically apply to this bed beyond the three-mile limit, and some fishermen were prosecuted for violating the closure (it was enforced only against California citizens). The three-judge federal court upheld the statute under Skiriotes. It stated:

> California does have a legitimate interest in regulating the taking of shrimp from the

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85. 92 Cal. Rptr. 481, 14 Cal. App. 3d Supp. 6 (Cal. App. 1970).

86. No. 47823 SAW (N.D. Cal. 1973) [unpublished opinion reprinted in Appendix to appellant's brief in No. 2435].

> ocean off its coast. The shrimp bed in question was discovered and developed by California officials. It is adjacent to California territorial wters and, shrimp being migrating fish, some of them undoubtedly enter California during their migration. The ability of California to control the shrimp within its territorial waters is dependent, to some extent, upon its ability to limit extraction of shrimp from the bed beyond.

The court also found no federal preemption, since no federal law actually conflicted with the state regulations. The law applies only to Californians, the court noted, and this was the basis of the state's jurisdiction, not the situs of the regulated activities.

We must confess at this point that the various interpretations of the case law in this area as urged by able counsel are clearly within the language of the opinions, and we would have an extremely difficult time favoring one approach over the other were it not for a recent decision of the Supreme Court of the United States which appears generally to tip the balance in favor of the appellants herein.

In United States v. Alaska,[87] the United States Supreme Court noted a distinction between regulation for the purpose of fish and wildlife and the exercise of historic dominion for the purpose of establishing sovereignty by the United States or a state:

> Our conclusion that the fact of enforcement of game and fish regulations in Cook Inlet is inadequate, as a matter of law, to establish historic title to the inlet as

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87. __ U.S. ___, 95 S. Ct. 2240, 45 L. Ed. 2d 109 (1975).

inland waters is not based on mere technicality. The assertion of national jurisdiction over coastal waters for purposes of fisheries management frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters. See, e.g., Presidential Proclamation No. 2668, 59 Stat. 885 (1945). This limited circumscription of the traditional freedom of fishing on the high seas is based, in part, on a recognition of the special interest that a coastal state has in the preservation of the living resources in the high seas adjacent to its territorial sea. Convention on Fishing and Conservation of the Living Resources of the High Seas, Art. 6, para. 1, 17 U.S.T. 138, 141 TIAS 5969 (1966). [Emphasis added]

This distinction constitutes a basic premise in this opinion and is important herein because it recognizes the simple but inescapable argument of appellant that in the absence of some effective regulatory power, the coastal state is totally unable to protect and preserve what are functionally its fisheries resources. In the instant case, the migratory habit of crab are demonstrated in the record. Most of the developmental stages in a crab's life occurs in territorial waters of the state and little fishing for crab is done in such waters because of the condition of the crab during this period. However, the crab then move into deeper waters for feeding, etc. and the fishing begins. In the absence of any control over these areas, the entire stock of the fishery can be depleted to the point where no crab fishery exists. The detriment to all persons is obvious.

We will now turn to analysis of the particular aspects of the problem of extending the state's police power jurisdiction extraterritorially.

The state has bolstered its argument by reference to cases from other states in which a "landing law"[88] has been upheld as being within the constitutional power of a state to regulate activity outside the area of its sovereignty. It cites a number of cases which will be discussed in turn.

In Silz v. Hesterberg,[89] the Supreme Court upheld New York laws prohibiting the possession of game in New York during a closed season, including game brought in from outside the state. The Court stated that the laws were aimed not at affecting the legality of taking game outside the state, but rather at protecting game located in the state. It concluded on this basis that the laws did not violate the due process clause of the Fourtheenth Amendment. The Court also concluded that the laws did not unlawfully regulate interstate commerce because the effect on commerce was only incidental and remote.[90]

In Bayside Fish Co. v. Gentry,[91] the Court upheld certain California fish and game laws that regulated the processing of sardines in California, whether the sardines were taken within the waters of the state or outside them. The purpose of the regulation, the Court found, was to

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88. As mentioned earlier in this opinion, "landing laws" are laws which prohibit the possession, sale or transportation of fish or game in a state which are taken in violation of state laws or regulations.

89. 211 U.S. 31, 29 S. Ct. 10, 53 L. Ed. 75 (1908).

90. Id. at 40-41, 29 S. Ct. at 12, 53 L. Ed. at 79-80.

91. 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936).

conserve for food the fish found in state waters. The provisions regulated only manufacture within the state, and their direct operation, intended and actual, was wholly local. The Court found any effect on interstate and foreign commerce to be "purely incidental, indirect, and beyond the purposes of legislation."[92] To the extent the laws dealt with the use or treatment of fish brought into the state from outside, the Court stated, their legal justification rested on the ground that they operated "as a shield against the covert depletion of the local supply, and thus tend[ed] to effectuate the policy of the law by rendering evasion of it less easy."[93]

Other courts have upheld similar laws on similar bases.[94] In each, the courts found that it was a valid exercise of police power for states to attempt to conserve fish located in state waters. The courts found further that this power includes the right to prohibit possession of fish taken outside the state or, in the case of Santa Cruz Oil, supra, to require a permit for any fishing boat operating in state waters, even if the boat caught all of its fish outside the state. Courts have found the effects of these laws on interstate commerce to be incidental and necessary to prevent possible deception by the fishermen: fishermen might otherwise subvert the conservation efforts of the states by fishing in

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92. Id. at 426; 56 S. Ct. at 515, 80 L. Ed. at 775.

93. Id. at 426, 56 S. Ct. at 515, 80 L. Ed. at 775.

94. See Frach v. Schoetler, 46 Wash. 2d 281, 280 P.2d 1038 (1955); Johnson v. Gentry, 220 Cal. 231, 30 P.2d 400 (1934); Santa Cruz Oil Corp. v. Milnor, 55 Cal. App. 2d 56, 130 P.2d 256 (1942).

state waters but claiming that they took their catch beyond those waters. The inability to distinguish fish taken within the state from those taken outside would render enforcement of the state laws difficult at best.

Appellees counter by asserting, as was posited in Hjelle v. Brooks,[95] that a state may regulate extra-territorial conduct only if the regulations facilitate conservation of a resource clearly within the state. They then take the position that since the majority of all fishing for king crab occurs outside the three-mile limit, and that crab only come inside the limit to mate or molt, there is simply no state fishery to be protected by the regulations.

However, the key question is whether Alaska's interest qualifies as one recognized for a legitimate exercise of police power. The answer is clearly yes--there is an established fishery with clear economic impact in the Bering Sea fishery area. The migratory habits of the crab are predictable and fishing outside the three-mile limit depends on growth and development with the limit. If the fishery outside the three-mile limit destroys the resource outside, it will similarly destroy the resource inside the three-mile limit. If the State of Alaska cannot protect this resource under its police power, then such power is far more limited than any recorded case reveals.

We do not find that the state's interest in regulation is as limited as the position asserted by appellees and adopted by the three-judge federal court in Hjelle. The Hjelle court based its decision on the conclusion that the purpose of the landing laws was to regulate the crabs beyond

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95. Hjelle v. Brooks, 377 F. Supp. 430 (D.C. Alaska 1974).

the limit, not within it. The court said:

> This line of cases leads us to conclude that Alaska's proferred nexus between its legitimate state interests and its regulation of certain extraterritorial conduct would pass constitutional muster if its regulations were directed at conserving the crab fishery within Alaska's waters by regulating crabbing in that area, and in order to facilitate enforcement, by prohibiting the possession of crab in the state during the closed season, even if that crab were caught outside the state. Despite the state's claim that the regulations are on "all fours" with these "landing law" cases, we find, after considering the language of the regulations and the affidavits presented "reasonably certain" to establish that the regulations do not fall within the purview of these cases.[96]

We conclude that an analysis of those cases cited demonstrates that in fact these decisions were justified primarily on conservation of the resource. The Silz decision, for example, may well have relied solely on the difficulty of enforcement, but that case is distinguishable on its facts, involving game which clearly did not migrate in and out of the state but with respect to which a difficulty of enforecement did exist due to the identity of the species.

In all of the "landing law" cases cited by the Hjelle decision and this court, not one required that an enforcement problem be necessary. While in most of the cases an enforcement problem did exist, it is unquestionable that those courts

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96. 377 F. Supp. at 441.

were apprised of the simple conservation principle which exists in the case at bar. Like the fish in all of the cases in question, crab exist both within and without the territorial waters of the State. It is impossible to quantify the amount of crab within Alaska waters in the BSSA (due in part to the lack of precise boundaries in the Bering Sea),[97] but it is clear from the facts that it is not "very small" as the Hjelle court preliminarily concluded; in fact it is rather significant at some times of the year, and fishable quantities exist during all times of the year.

Of those cases cited in Hjelle, the Frach case, supra, is perhaps the most directly analogous. There,a Washington statute requiring a permit for bringing certain fish taken on the high seas into the state was upheld as constitutional. The court found no conflict with the interstate commerce clause, since any burden on interstate commerce was the indirect result of a measure needed to facilitate regulation of in-state fishing, because of the impossibility of distinguishing among fish caught different places. That case involved salmon which, like crab, spend the substantial portion of their lives on the high seas and return to state waters for only short periods of time to spawn. In several respects, however, salmon as a migratory resource present a more extreme case than crab in that they spend the majority of their lives in high seas areas far beyond territorial waters, while Alaskan crab do not. Also, there are periods when salmon are totally absent from state waters, whereas crab exist year round in fishable quantities in the territorial waters of the Bering Sea.

Since the regulation in question was enacted pursuant to the State's "police power," we also

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97. Id, at 445.

note an Alaska decision on this subject. In Kingery v. Chapple[98] we noted that when a regulation is challenged as a violation of the police power of the state, the issue is whether the regulations bear a reasonable relationship to the purpose sought to be achieved. While this Court in Kingery held that under these circumstances the state is required to come forward with at least prima facie evidence that a reasonable relationship exists, the Hjelle court seemed to be requiring that the state prove conclusively that its system provide the most effective system with the least possible infringement on "extra-territorial conduct."[99]

Nor did the Hjelle court give the state the benefit of all doubts in deciding the nature of the purpose behind the state's regulations.[100] Rather, the court in Hjelle assumed that the state sought to directly regulate extra-territorial conduct because the quota was based on fishing in the entire area, because one regulation prohibits the possession in Alaska only of that crab and sea life "taken seaward" of Alaska territorial waters, and because the percentage of king crab taken commercially within Alaska waters is very small. These conclusions run contrary to all authority on the subject regarding the intent to be given state laws.

The intent of the state's laws and regulations is clearly not to effect extra-territorial activity to any greater extent than is necessary to preserve the king crab fishery

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98. 504 P.2d 831, 835-36 (Alaska 1972).

99. Hjelle v. Brooks, 377 F. Supp. 430, 441 (D.C. Alaska 1974).

100. Id. at 431.

within state waters. If it is not clear from the legislative findings in AS 16.10.180, it is certainly clear from the facts developed in this case--crab are migratory creatures which move offshore, beyond the state's territorial boundary at various times during a given year. If the state is to conserve the crab existing within the state, it must regulate the taking of crab outside the state. If fishermen were allowed to fish the crab beyond the state's border unregulated, the maximum sustained yield of crab both inside and outside the state would decrease.

Unlike the situation in Silz, where the extra-territorial taking would not in the least affect the in-state resources stocks, the interdependency of the in-state and extra-territorial resources is determinative. AS 16.10.180(4)(5) makes it clear that the purpose of the application of fisheries laws to the high seas is to conserve shellfish found "inside the waters of the state." The method of accomplishing this purpose is reasonably related to the purpose; it is, therefore, permissible. Kingery v. Chapple, supra.

Nor can defendant argue that the effect on extra-territorial conduct somehow requires a higher standard of review. Such a requirement is nowhere to be found in any of the extra-territorial conduct cases. Hjelle, while seemingly applying a higher standard, failed to consider either Skiriotes or Toomer v. Witsell, supra. Those cases clearly found sufficient nexus on only minimal proof of "nexus" while extra-territorial regulation was clearly necessary to preserve a migratory resource.

Finally, the Hjelle court in fact specifically recognized that other "nexus" might well sustain the regulations in question if developed by competent evidence. In the case in question, such competent evidence exists before this court in the stipulations of the parties, and we conclude that on balance a sufficiently close connection to

legitimate state interests has been established to validate the state's limited efforts to regulate this resource.

We are cognizant of the unfortunate situation created by a restrictive reading of the "landing law" cases. The state which is the fishery breeding ground has no ability to regulate unless it can demonstrate a local fishery resource. Consequently, in undeveloped areas of Alaska such as the northern portions of the Bering Sea and the Arctic Ocean there could simply be no regulation. The subsistence nature of the fishery and the lack of economic development by the aboriginal inhabitants prior to the Alaska Native Settlement Act of 1972 would be the fortuitous circumstance which prevented regulation. We find such a view to be, in short, unrealistic and unacceptable. We therefore conclude that a state may reasonably extend its jurisdiction to control fish and game resources outside the limited area of its territorial sovereignity, if such an exercise is based on the conservation principles inherent in their migratory characteristics and not based on articical boundaries or political circumstances.

B. People to be Controlled.

Almost indistinguishable from the question of the area of control is the extent of control over fishermen, both local and foreign; this is so mainly because the reasoning applied to one area is equally applicable to the other.

Appellees urge a restrictive reading of Skiriotes[101] to limit the extra-territorial control over fisheries solely to residents of the State of Alaska. The effect of such a result is

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101. Skiriotes v. Florida, 313 U.S. 69, 61 S. Ct. 924, 85 L. Ed. 1193 (1942).

obvious from both a conservation and a practical standpoint.

If the state has no authority to regulate non-resident fishermen of a migratory fishery species it has no effective authority to regulate the fishery. As noted in the dissenting opinion in Hjelle v. Brooks:[102]

> The Bering Sea king crab population data obtained by the National Marine Fisheries Service establishes that the present capacity of commercial fishermen to take king crab far exceeds the estimated maximum sustained yield of the Bering Sea Shellfish Area. Biologists generally agree that productivity of this fishery cannot be sustained absent a regulatory scheme such as that which plaintiffs presently attack . . .

Further, if a state is forced to distinguish between its own citizens and citizens of other states in giving extra-territorial effect to its laws, the state's own citizens can easily frustrate the legitimate objectives of these laws by simply transferring their citizenship to another state. An Alaskan citizen, for example, could easily avoid the effect of Alaska's laws by transferring his citizenship to Washington. This reality is hardly the same as that apparent in international issues since it is considerably more difficult, and less advantageous, for a citizen of one nation to change his citizenship to another nation in order to avoid the effect of his nation's extra-territorial fishing laws. Hence, a narrow reading of the citizenship limitation suggested in Skiriotes could lead to the deliberate frustration of a state's extra-territorial fishing laws. The

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102. 377 F. Supp. 430, 444 (D.C. Alaska 1974) (dissenting opinion).

state suggests, instead, an important and acceptable widening of the usefulness of Skiriotes by its reading of the concept "citizen." If only Alaskan citizens may be restricted in their Bering Sea crabbing, the regulation will not be very efficacious in managing the stock.[103] But the state's theory would broaden the Skiriotes concept of "citizen" to encompass all American nationals, and hence most if not all of the Bering Sea crabbers, because of their numerous nexi with Alaska.

The state's theory is based mainly on one case, but it draws on certain general principles of domestic and international law as well. The one case is Jacobson v. Maryland Racing Commission.[104] Jacobson, an owner and trainer of race horses, was licensed as such by the Maryland Racing Commission. A rule of the Commission prohibited resale of a horse claimed in a claiming race for 60 days after that race. Jacobson claimed three horses in a Maryland race and within 60 days sold them in New York. The Commission thereupon suspended his licenses, and Jacobson filed a petition asserting, among other things, that the Maryland rules could not be applied against his out-of-state activities. The court, after pointing out that only by means of a license from the Commission could one engage in racing in Maryland, held Jacobson bound by the Commission's rules. It invoked the very general proposition that acts done outside a jurisdiction which produce detrimental effects inside it justify a state in punishing he who caused the harm as if

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103. The record does not show a firm breakdown of Alaskan v. non-Alaskan crab taken in the Bering Sea. We are simply assuming that out-of-staters account for at least a substantial amount of the take.

104. 274 A.2d 102 (Md. 1971).

he had been present at the place of its effect.[105] It also cited Skiriotes and declared:

> We think that Jacobson had become a racing citizen of Maryland as far as the purposes and effects of the Rules are concerned and that this State acquired sufficient personal jurisdiction over him in matters of licensed racing to permit it to enjoin him by Rule 80, . . . and to punish him if he disobeyed that rule.

As applied to the crab cases, the state points to the Alaska licenses and numerous nexi of the defendants with Alaska,[106] and posits that the defendants have thereby become "crab fishing citizens" of Alaska.

Although we are not persuaded that the state's creation of the concept of a "crab fishing citizen" is particularly helpful--or even appropriate--we do find Jacobson to afford sufficient rational precedent to conclude that Alaska's regulations in

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105. See Strassheim v. Daily, 221 U.S. 280, 31 S. Ct. 558, 55 L. Ed. 735 (1911); United States v. Aluminim Co. of America, 148 F.2d 416 (2d Cir. 1945); United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968); Restatement (Second) of Conflict of Laws Section 65 (1971); Restatement of Foreign Relations Section 18 (1965).

106. The stipulation in Bundrant, No. 2295, and similar facts which the state offers to prove in the other cases, effectively establish that Bering Sea crabbers daily make use of Alaskan territorial waters and facilities, and probably could not continue to crab in the area without using Alaskan shore-based facilities.

this case do not amount to more than a proper and logical extension of the state's police power.[107] Therefore, we find that all of the persons herein were properly charged.

In order that there is no confusion with regard to our holding, we reiterate that the difference in status between each offender does not affect Alaska's jurisdiction over him. Whether the appellee was an Alaska resident (as is Vinberg), was arrested on the high seas in the Bering Sea crab area (as was Uri), the State may proceed to enforce its crab regulations herein against said appellee.

These cases are reversed and remanded for further consideration in conformity with this opinion.[108]

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107. We consequently find ourselves in complete agreement with analysis suggested in United States v. Thompson, an unreported decision by the United States District Court for the District of Alaska (No. A-87-72 Cr., Dec. 15, 1972) [see appendix, Ant Br, 2295], where the court concluded that the constitutional propriety of an effort by the State of Alaska to regulate the polar bear hunting "activities of American citizens [who were non-residents of Alaska] on the high seas adjacent to Alaska is not subject to censure in light of Johnson v. Gentry, 30 P.2d 400 (Cal. 1934), and Skiriotes v. Florida, 313 U.S. 69 (1940)."

108. By virtue of our decision herein, we did not pass on other legal arguments advanced by appellees. The decision of the trial court was based on the doctrine of federal pre-emption, and did not consider other grounds for dismissal. Clearly these arguments may be renewed in the trial court.

RABINOWITZ, Chief Justice, concurring.

I concur in that portion of Justice Erwin's opinion which deals with the issues of federal exclusivity and federal pre-emption. Justice Erwin persuasively demonstrates that Alaska's regulation of crabbing both within and beyond its territorial seas is entirely compatible with the federal constitution and existing federal legislation. However, I deem it appropriate to express my views regarding the permissible reach of state police powers in the absence of paramount federal authority.

I think it significant that the appellees in this matter were prosecuted under different statutes and regulations which are deserving of individual analysis. Appellee Bundrant was prosecuted for possessing, within Alaska's waters, crab taken in a high seas area that had been closed to fishing.[1] Such conduct has been criminalized by AS 16.10.200, which provides:

> It is unlawful for a person taking migratory fish and migratory shellfish in high seas areas designated by the Board of Fisheries or in violation of the regulations promulgated by the Board of Fisheries governing the taking of migratory fish and migratory shellfish in the designated areas to possess, sell, offer to sell, barter, offer to barter,

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1. The relevant regulations applicable at the time of Bundrant's alleged criminal conduct were 5 AAC 07.100, which defined the regulatory area in question, and 5 AAC 07.760, which authorized closure of the area when a quota of 23 million pounds of king crab was met. The quota was reached and the area closed effective September 9, 1973, and Bundrant's actions occurred shortly thereafter.

> give or transport in the state, including the waters of the state, migratory fish or migratory shellfish.

Functionally this legislation is indistinguishable from the so-called "landing laws" which numerous courts have sustained as a valid exercise of state police powers.[2] Although these laws unquestionably have an effect on conduct beyond the territorial confines of a state, their legitimacy derives from the fact that their objective is the preservation of an important state natural resource, the loss of which would impair the health, safety, and welfare of the particular state. Thus, AS 16.10.200 is equally legitimate and an exercise of police powers if it can be said that the State of Alaska has a valid interest in the migratory crab resources within its territorial waters. I think the record in the case at bar demonstrates that Alaska has such an interest. Here we have evidence that crab exists within Alaska's waters throughout the year,[3] and according to the evidence, this resource is subject to constant fishery harvest.[4] Even when in the stages of molting and mating these crabs remain of value both to man and to the larger marine ecosystem. Walrus, sea otters, fur seals and a variety of other marine mammals which inhabit our territorial waters depend on king crab as a major

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2. Compare, for example, the challenged statutes in Frach v Schoettler, 46 Wash.2d 281, 280 P.2d 1038 (1955), and Johnson v. Gentry, 220 Cal. 231, 30 P.2d 400 (1934).

3. Stipulation 28 in no. 2295.

4. Statements of Emergency by the Fish and Game Board, May 9, 1974, and June 25, 1974.

source of food.[5] Thus, the crab population in Alaskan waters is of inestimable importance to those whose lives and livelihood depend on our marine resources.

Although the regulations promulgated in fulfillment of this llegislation may not have been drafted as artfully as some would wish, I find no reason to doubt that the legislature's objective in enacting AS 16.10.200 was the protection of marine resources within the state. Indeed, in AS 16.10.180 the legislature stated as much rather explicitly:

> The legislature finds and recognizes these facts:
>
> (1) Migratory fish and migratory shellfish are present in commercial quantities inside and outside the territorial waters of the state.
>
> (2) Migratory fish and migratory shellfish taken from the waters of the state are indistinguishable, in most cases, from those taken from the adjacent high seas.
>
> (3) Substantial quantities of migratory fish and migratory shellfish move inshore and offshore intermittently and at various times during a given year and in so doing often enter and leave territorial waters of the state.
>
> (4) To conserve the migratory fish and migratory shellfish found inside the waters of the state it is necessary to strictly enforce local laws and regulations.

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5. Stipulation 20 in no. 2295.

(5) By making certain laws and regulations passed or promulgated for the regulation of the coastal fishery applicable to the adjacent high sea areas, enforcement of these laws and regulations is facilitated.

(6) Conservation regulations should not be promulgated to impose economic sanctions.

It follows that AS 16.10.200 is fully sustainable as a conventional landing law and under the authority of the landing law cases,[6] appellee Bundrant may be validly prosecuted for possession of king crab within the state in violation of that provision.

Appellee Kaldestad was also charged in count IV with possession of crab within state waters in violation of AS 16.10.200 and AS 16.05.920.[7]

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6. E.g., Bayside Fish Co. v. Gentry, 297 U.S. 422, 80 L. Ed. 772 (1936); Silz v. Hesterberg, 221 U.S. 31, 53 L. Ed. 75 (1908); Frach v. Schoettler, 46 Wash.2d 281, 280 P.2d 1038 (1955); Johnson v. Gentry, 220 Cal. 231, 30 P.2d 400 (1936); Santa Cruz Oil Corp. v. Milnor, 55 Cal. App.2d 56, 130 P.2d 256 (1942).

7. AS 16.05.920(a) provides:

> Unless permitted by this chapter or by regulation made under this chapter, it is unlawful for a person to take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game or marine aquatic plants, or any part of fish, game or aquatic plants, or a nest or egg of fish or game.

Prosecution of this count also represents the legitimate enforcement of a valid landing law.[8]

The 14 appellees in Uri et al. (no. 2535) and appellee Kaldestad in the first three counts (no. 2444) were charged with violating various provisions of the emergency regulations promulgated June 15, 1974. These measures prohibited the taking[9] and possession[10] of king crab and the possession of crabbing equipment[11] during a closed season in a registration area subject to state regulation. The criminal acts which form the basis of these charges allegedly occurred in the Bering Sea from 16 to 60 miles off the coast, in an area designated as registration area Q.

The legislature has attached criminal sanctions to the violation of such regulations by the terms of AS 16.05.920 and AS 16.10.200. Thus, the legality of these prosecutions depends upon whether the state may validly apply its crabbing regulations to this conduct occurring beyond territorial waters.

Among these appellees there is one, Emil Vinberg, who is a citizen of the state of Alaska. It is clear since Skiriotes v. Florida, 313 U.S. 69, 85 L. Ed. 1193 (1941), that a state may regulate the extraterritorial fishing activities of one of its citizens where the state has a legitimate interest in the fishery involved. Alaska has such a concern in the Bering Sea crab fisher, and therefore the prosecution of appellee Vinberg under the emergency regulations is controlled by

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9. 5 AAC 34.910.

10. 5 AAC 34.090(c).

11. 5 AAC 34.095.

Skiriotes and its progeny.[12] The prosecution of Vinberg is valid.

The other appellees in Uri et al. maintain residences outside the state of Alaska, as does appellee Kaldestad. Although their seasonal occupation allows them to maintain a formal citizenship elsewhere, these fishermen participate extensively in the economy of Alaska's seacoast communities. They depend on Alaskan industry and hospitality for a vast range of support services, including shelter, food, fuel, repair services and medical care.[13] I join in Justice Erwin's view that Skiriotes provides an adequate foundation for the validity of the action against these appellees. That case is one manifestation of the larger principle that a state may apply sanctions to activity outside its borders which has a substantial, direct and foreseeable deleterious effect within the jurisdiction when it is undertaken by a citizen of a sister state who has significant contacts with the jurisdiction. Thus, in my opinion, the prosecution of the remaining appellees under the emergency regulations is also a valid exercise of the state's police powers.

In summary, therefore, the landing law cases emanating from Silz v. Hesterberg, 211 U.S. 31, 53 L. Ed. 75 (1908), authorize the State's prosecution of appellees Bundrant and Kaldestad under count IV. The prosecution of appellee Vinberg is unquestionably authorized by Skiriotes v.

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12. E.g., Felton v. Hodges, 374 F.2d 337 (5th Cir. 1967); People v. Foretich, 92 Cal. Rptr. 481, 14 Cal. App.3d 6 (Cal. App. 1970); Gherra v. California Fish and Game Dep't, No. 47823 SAW (N.D. Cal., 1975).

13. Stipulations 9-19 in no. 2295.

Florida, supra. Under the broader principle governing the extraterritorial application of criminal laws, manifested in part in Skiriotes, the remaining appellees in Uri et al. and appellee Kaldestad may also be prosecuted for their conduct. Justice Erwin and I break new ground, if at all, only in expressly recognizing that broader principle.

CONNOR, Justice, dissenting.

Like the crabs about whom the dispute exists, many of the questions presented in this appeal can be discerned only by peering through murky waters. The arguments are close. However, my examination of the problems presented leads me respectfully to dissent. It is on the question of federal preemption that I depart from my colleagues.

The majority finds that the regulation of crabbing outside the marginal sea is not pre-empted by the federal government. I am willing to concede at the outset that United States v. California (First California), 332 U.S. 19, (1947), does not, alone, establish federal preemption of state regulation. That case only established federal ownership of the land beneath the marginal sea in the sense that the federal government has the "paramount" right and power in the area. 332 U.S. at 33, 39, 40. While establishing federal dominium, a subordinate right of state imperium was apparently not precluded.[1] The court in First California distinguished one prior case, The Abby Dodge, 223 U.S. 166, (1912), on the grounds that First California was not prohibiting state regulation. The next year saw the court's decision in Toomer v. Witsell, 344 U.S. 385 (1948), which supports the legitimacy of a state's juris-

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1. Dominium, a concept which derives from Roman law, denotes ownership and property rights, while imperium concerns regulatory power or control over a geographical area without reference to ownership. United States v. California (First California), 332 U.S. 19, 43-44 (1974)(Frankfurter, J., dissenting); see also P. Jessup, the Law of Territorial Waters and Maritime Jurisdiction 62, 118, 400-407 (1927; Kraus Reprint 1970); Webster's Third New International Dictionary, 1133 (1968).

diction over its own citizens for regulatory purposes on the high seas, i.e., imperium, rather than dominium, over shrimp.

The rationale for the First California decision is important. The court reasoned that control of the sea and its resources is so bound up with international affairs and national defense that it "is a question for consideration among nations as such, and not their separate governmental units." 332 U.S.at 35. This rationale, read expansively, might suggest a reason for preemption of all state regulation, at least of citizens other than its own, in the high seas outside its own borders.

Congress, as noted by the majority, reversed the First California case with respect to the marginal sea via the Submerged Lands Act (SLA), 43 U.S.C. sections 1301-1315 (1953). Later in the same year, it claimed at least federal ownership of the continental shelf beyond the marginal sea through the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. sections 1331-1343 (1953). This second act began life as an amendment to the SLA, but became separated in the course of passage.

The net effect of these two acts was to establish state ownership of the traditional marginal sea, while at the same time asserting ownership of and jurisdiction over the continental shelf as against foreign governments, and vesting that ownership and jurisdiction in the federal government. That federal control was to encompass both ownership and regulatory authority was indicated by Senator Cordon (the manager of OCSLA) at 99 Cong. Rec. 6963 (1953), where he appears to show approval for certain language contained in a Justice Department report:

> On the other hand, as pointed out in the report made by the Department of Justice on S. 1901, the area is one in which national

problems intermingle. The outer Continental Shelf is not and never has been within the boundary of any State or Territory, and it is, therefore, uniquely an area of exclusive Federal jurisdiction and control . . .

The report of the Department states in part:

"This--that is, the outer Continental Shelf--is a Federal area, outside State boundaries, and to give the states a sort of extra territorial jurisdiction over it is unnecessary and undesirable. The situation is not comparable to that of federally owned areas within a State, as to which State law has some measure of applicability. Particularly in view of the intermingling of national and international rights in the area, it is important that the Federal Government, which has the responsibility for handling foreign relations, have the exclusive control of lawmaking and law enforcement there."

An amendment by certain senators which would have extended state jurisdiction to the Continental Shelf, including the "conservation laws" of the states, was defeated. 99 Cong. Rec. 7228, 7230, 7232 (1953). Most importantly, the language of the statute itself [43 U.S.C. Section 1332 (1953)] provides for federal "jurisdiction, control, and power of disposition." This would appear to encompass considerably more than mere "ownership."

Notwithstanding all this, the majority believes that crabs were not intended to be covered by the OCSLA. 43 U.S.C. Section 1332(b)(1953) expressly provides that the OCSLA does not affect "the character as high seas of the waters above the outer Continental Shelf and the right to . . . fishing therein . . . " It is true that the principal concern of Congress was with mineral deposits, not living resources. See H.R. Rep. No. 413, 83rd Cong., 1st Sess. (1953). But it should

be recognized that the language of the OCSLA was at the same time an attempt to establish the policy of the United States to appropriate the resources of the continental shelf with respect to foreign governments. Therefore the interpretation of OCSLA in the context of international law is relevant, if not conclusive, as to its meaning. It does not seem likely that the same language, indeed the same sections, could have a different meaning in international law from its meaning for preemption purposes. Cf. United States v. California (Second California), 381 U.S. 139, 165 (1965); United States v. Ray, 423 F.2d 16, 21 (5th Cir. 1970).

The rights of nations to the resources of the continental shelf were more clearly defined in international law by the Geneva Convention on the Continental Shelf, 15 U.S.T. 471, T.I.A.S. 5578 (1958). Article 2.4 of that convention provides that the natural resources appertaining to nations shall include,

> "living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."

That crabs are included in that classification is past dispute in this country. See Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Relating to Fishing for King Crab, [1965] 16 U.S.T. 24, T.I.A.S. 5752, art. 1; Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Relating to Fishing for King and Tanner Crab, [1973] 24 U.S.T. 603, T.I.A.S. No. 7571, art 1 (extension: December 31, 1974).

In order to vest the greatest rights in the United States as against foreign governments, the terms of the OCSLA must be interpreted broadly in light of later developments. One court has even held that "[t]o the extent that any of the terms of the [OCSLA] are inconsistent with the later adopted Geneva Convention on the Continental Shelf, they should be considered superseded."[2] I see nothing in the OCSLA, however, inconsistent with the interpretation that crabs are a resource of the continental shelf, and hence appertain to the United States as against foreign and state governments, rather than of the water column above. United States v. Ray, supra, found this to be the case with coral, also a "sedentary species". Of course, Guess v. Read, 290 F.2d 622, 625 (5th Cir. 1961), cert. denied, 368 U.S. 953 (1962), cited by the majority, is totally inapplicable here. All would agree that the OCSLA and the treaties pertaining to the continental shelf do not affect rights to the air above the sea, or the water column above the shelf.

Reliance upon various portions of legislative history dealing with the relationship of the OCSLA to "fishing rights" begs the question.

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2. The United States Supreme Court used a similar rationale in concluding that the definitions provided in The Convention on the Territorial Sea and the Contiguous Zone of 1958 should be used to define "inland waters" under the Submerged Lands Act. United States v. California (Second California), 381 U.S. 139, 165 (1965). In that case, State Department letters from the era of the SLA passage actually contradict the definition later adopted in the 1958 Territorial Sea Convention, and yet the Supreme Court chose the more modern international usage. I know of no reason why this method of interpretation should not also be applied to OCSLA.

Whether crabs are included in fishing rights, or are a resource of the ocean floor, for purposes of the act is precisely the question at issue here. Senator Cordon's language indicates only that the Senator believed fishing rights for "all marine life above the land itself beneath the seas" (emphasis added) were not included in the OCSLA. See Sen. Rep. No. 411, 83rd Cong., 1st Sess. (1953). But crabs, in both international law, as related above, and municipal United States law, Bartlett Act, 16 U.S.C. Section 1085 (1964), are creatures of the sea floor, and not fish belonging to the water column "above the land itself."

I conclude that crabs, as a resource of the continental shelf, may be regulated only by the federal government when they are taken outside the three mile marginal sea under the provisions of SLA, 43 U.S.C. Section 1301(a) and (b) (1953).

The validity of this conclusion can be tested by an inverse approach. Let us assume, arguendo, that OCSLA cannot be construed to include crabs as a resource of the subsoil and seabed of the outer continental shelf. It still does not follow that there is no preemption. The SLA, 43 U.S.C. Section 1302 (1953) provides:

> "Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed." (Emphasis added)

I would find that the language above from the SLA preempts state regulation beyond the three-

mile marginal sea. The section cannot be read as only limiting the effect of the SLA. While that is the import of the first part of the section, the language emphasized above goes further in specifically "confirming"[3] exclusive federal "jurisdiction and control" as against the states. Under this section, it makes no difference whether crabs are conceived of as creatures of the continental shelf or of the water column above it; the section reserves to the United States jurisdiction and control over "all . . . natural resources" outside the marginal sea, and 43 U.S.C. Section 1301(e) (1953) specifically includes "fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life" (emphasis added) within the definition of "natural resources".

The reason for federal preemption must be drawn from the rationale of the First California case, supra. The whole area of regulation of ocean-floor resources is inextricably entwined with international law and affairs. As we have seen, any rights to regulate at all in the area of the continental shelf derive from recent developments in the unsettled field of the international law of the sea. Congressional proposals to establish a 200-mile federal fishing zone[4]

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3. By using the word "confirm", it would appear that Congress thought control over resources outside the marginal sea was already vested in the federal government by the First California case. In my opinion that belief was erroneous (see above).

4. "[B]ills that would declare a 200-mile fishing zone have been introduced in both Houses of Congress but the administration is firmly opposed to giving U.S. fishermen exclusive rights out to 200 miles fearing that such action would disrupt the 1974 Law of the Sea Conference where global arrangements on fishing will hopefully be

have generated much publicity and dissension; it would appear that Alaska's own federal Senators hold widely divergent views on the propriety of such legislation at this time. The whole topical area, with special reference to ownership and regulatory authority over resources of the continental shelf and deep-sea bed, is currently being negotiated in the International Conference on the Law of the Sea. One of the principal concerns of the United States is attempts by a majority of the world's nations to extend national control farther and farther into the sea. One reason for this concern is the thrust by other nations, as evidenced both at the Conference and by individual action, to extend unilaterally their territorial as to 200 miles. The right asserted is the "special interest of coastal States in maintaining the productivity of the living resources of the sea adjacent to their coasts. . . ."[5] This

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4. (Cont.)

reached." North Carolina University (prepared for National Oceanic and Atmospheric Administration), State and Federal Jurisdiction Conflicts in the Regulation of United States Coastal Waters 8 (1974). It is important to note that this study cannot fairly be characterized as a "federal document" in the sense that it evinces the official policy of the United States. I believe that the reliance upon the officiality of this report in the majority opinion is misplaced.

5. Decree-Law Extending Territorial Sea to 200 Miles, Diario Official (Brazil, 30 March 1970), reprinted in I S. Lay, R. Churchill, M. Nordquist, New Directions in the Law of the Sea: Documents 15 (1973) (translation by U.S. State Department). Chile, Ecuador, and Peru have adopted a similar rationale: the right of a state to "ensure the conservation and protection of its natural resources and to regulate the use thereof ..."

is essentially the same basis used by the majority to justify the extension of Alaskan jurisdiction into the Bering Sea. As such, it could cause definite embarrassment to our international negotiators. It is merely one more example -- a very current and real example, and not in the slightest "speculative" and "indirect" -- of the pervasive involvement of foreign affairs in this area.

In terms of international complications, Alaska's assertion of imperium cannot be distinguished from the assertion of dominium by certain Latin American states. It is not clear that all Latin American nations recognize a functionally practical distinction between the two;[6] it is even more unclear that those of the world's nations whose legal consciousness is less firmly rooted in Roman Law than is Latin America's, will necessarily

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5. (Cont.)

Agreements between Chile, Ecuador and Peru, signed at the First Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, Santiago, 18 August 1952, Revista Peruana de Derecho International, tomo XIV, No. 45, 1954, at 104 et seq., reprinted in Lay, Churchill and Nordquist, supra at 231 (translation by the Secretariat of the United Nations). See generally M. McDougal and W. Burke, the Public Order of the Oceans 435-54 & n.18 (1962).

6. The Brazilian Decree-Law, supra note 5, stated that Brazilian "interest[s] can be effectively protected only by the exercise of the sovereignty inherent in the concept of territorial sea." Thus, it apparently does not recognize the efficacy of such notions as limited imperium in the regulation of off-shore resources. The recognition of the right of a state to regulate leads inexorably, in Brazil's view, to the establishment of dominium over the area.

and clearly understand the difference intended by Westerners between the terms imperium and dominium. But perhaps more importantly, it is not all clear that the United States State Department itself accepts the distinction in all cases. The United States has certainly opposed Canadian legislation purporting to establish that government's imperium to regulate pollution in the Canadian arctic, as it relates to the high seas.[7] The Canadians rely upon similar arguments of necessity as do my colleagues in the case at bar.[8]

Even if one assumes that the taking of crabs is "fishing", and does not under OCSLA fall under federal jurisdiction on the continental shelf, it must be noted that the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas (20 April 1958)[9] provides that when a state

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7. Department of State Statement on Government of Canada's Bills on Limits of the Territorial Sea, Fisheries and Pollution, U.S. Department of State Press Release No. 121 of 15 April 1970, reprinted in I S. Lay, R. Churchill, M. Nordquist, New Directions in the Law of the Sea: Documents 211 (1973).

8. Summary of Canadian Note of April 16 Tabled by the Secretary of State for External Affairs in the House, 17 April 1970 (from text provided by Canadian Embassy at Washington, D.C.), I S. Lay, R. Churchill, M. Nordquist, New Directions in the Law of the Sea: Documents 213, 216-17 (1973).

9. Reprinted in I S. Lay, R. Churchill, M. Nordquist, New Directions in the Law of the Sea: Documents 353, 354 (1973).

properly[10] adopts for its own nationals,

> measures . . . for the purpose of the conservation of the living resources affected

by fishing (Article 3), and,

> subsequent to the adoption of the measures referred to in articles 3 and 4, nationals of other States engage in fishing the same stock or stocks of fish or other living marine resources in any area or areas of the high seas, the other States shall apply the measures, which shall not be discriminatory in form or in fact, to their own nationals not later than seven months after the date on which the measures shall have been notified to the Director-General of the Food and Agriculture Organization of the United Nations. (Article 5)

Thus, if states may regulate "fishing" on the high seas generally, their regulations, once notified to the proper authorities, create international obligations. Signatory foreign nations whose nationals subsequently fish the area must pass similar laws for their nationals. While this would not immediately affect Bering Sea crab, in particular,[11] it would be

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10. Under Article 3, when nationals of other nations are not engaged in fishing in the area. If foreign nationals are so engaged, Articles 4 and 9 contemplate international negotiations between the concerned nations concerning regulations. Such regulations negotiated also become applicable to later nations by the mechanism of Article 5, as outlined in the text.

11. Japan and the Soviet Union are the two foreign states most interested in Bering Sea crab,

applicable in general were the principle established that states may regulate fishing outside the marginal sea. Thus the ratinale of the First California case, that regulation on the high seas in inextricably entwined with foreign affairs, leads me to the opinion that high seas fisheries regulation is reserved to the federal government.[12]

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11 (cont.)

and neither is currently a signatory of the 1958 Convention. The danger posed by the Convention in general, however, is real; there are 22 signatories, including Great Britian and the United States. It is not enough to reply that the federal government may refrain from notifying the Director-General of the FAO under Article 5. The fact that it might do so, coupled with the existence of the regulations, can be a constant source of irritation in negotiations, especially with nations not fully conversant with the intergovernmental rivalries inherent in American federalism. Further, it is not clear from the wording of Article 5 that only the United States may notify the Director-General. Hence an assurance by the State Department, even if believe, might carry little weight with foreign powers should any uncertainty exist as to whether a third power might be able to notify and set the Article 5 machinery in motion.

12. The majority relies on Alaska v. Artic Maid, 366 U.S. 199 (1961), to show local importance under the commerce clause, and seems to appeal to this argument under its balancing test when considering foreign affairs. This reliance is misplaced. The United States Supreme Court in that case never upheld any attempt by Alaska to tax activity outside the three-mile limit. In fact, the opinion expressly states that if the fish there in question "were taken or purchased outside the Bristol Bay area would be beyond Alaska's reach."

The majority opinion notes that Alaska regulation in this area was promulgated at the request of a federal agency. I note, however, that the United States has filed an amicus brief which supports appellees against the State of Alaska. This brief was prepared by the Department of Justice, "in consultation with other concerned federal agencies," and especially in consultation with the Legal Adviser for the Department of State.[13] Thus I cannot infer, as the majority appears to do, that the Alaska regulations have the implicit approval of the federal government, especially as they affect foreign policy.

In conclusion, I would find that:

(1) State legislation is preempted by OCSLA, 43 U.S.C. Section 1332(a), as crabs are legally a resource of the ocean floor rather than of the water column above that floor.

(2) State legislation is preempted by SLA, 43 U.S.C. Section 1302, regardless of the characterization of the crab resource.

(3) Notwithstanding any of the above, foreign and military affairs are so inextricably entwined with the regulation of high seas resources that, absent explicit Congressional delegation to the states, the area is excluded from state regulation.

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12. (cont.)

366 U.S. at 203. The court remanded the case for a determination of how many fish were obtained outside of Alaska's territorial waters (366 U.S. at 205), and the case was settled on appeal before the Alaska Supreme Court.

13. United States Memorandum in Support of Motion for Leave to File Brief Amicus Curiae at 2.

Since I would find federal preemption of the field, the subject of state jurisdiction is, in my opinion, irrelevant. Therefore, I express no opinion on that subject. I would affirm the judgment of the superior court.

APPENDIX B

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant, v. CHARLES BUNDRANT, Appellee.	)	File No. 2295
STATE OF ALASKA, Appellant, v. KONRAD S. URI, et. al., Appellees.	)	File No. 2435
STATE OF ALASKA, Appellant, v. CORY A. KALDESTAD, Appellee.	)	File No. 2444 MANDATE

To: Superior Court of the State of Alaska,
Third Judicial District at Anchorage.

State of Alaska filed appeals from judgments of the Superior Court, Third Judicial District at Anchorage in Criminal Actions No. 73-724, 74-12,223, 74-12,222, 74-12,221, 74-12,232, 74-12,220, 74-12,231, 74-12,219, 74-12,230, 74-12,218, 74-12,247, 74-12,217, 74-12,224, 74-12,233, 74-12,234 and 74-12,274 entitled,

STATE OF ALASKA, Plaintiff v. CHARLES BUNDRANT, Defendant; STATE OF ALASKA, Plaintiff v. KONRAD S. URI, et al., Defendants; STATE OF ALASKA, Plaintiff v. CORY A. KALDESTAD, Defendant.

The cases were heard by this court on May 23, 1975. On January 19, 1976 the court filed its written opinion. Appellees' petition for rehearing, filed January 29, 1976, was denied March 26, 1976.

It is ORDERED:

The judgements of the superior court are reversed and the cases remanded for further consideration in conformity with the opinion filed January 19, 1976.

WITNESS the Honorable Robert Boochever, Chief Justice of the Supreme Court, State of Alaska, this 2nd day of April, 1976.

CLERK OF SUPREME COURT

Donna Spragg Pegues

APPENDIX C

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant, v. CHARLES BUNDRANT, Appellee.	)	File No. 2295
STATE OF ALASKA, Appellant, v. KONRAD S. URI, et. al., Appellees.	)	File No. 2435
STATE OF ALASKA, Appellant, v. CORY A. KALDESTAD, Appellee.	)	File No. 2444
	)	ORDER DENYING PETITION FOR REHEARING

Appellees in cases #2435 and 2444 have petitioned for rehearing, alleging there was no factual

basis for the assertions made in the opinion herein. Appellees assert they did not join in the agreed statement of facts presented in case #2295 and that there was no hearing in the trial court, so that most factual allegations in the opinion are disputed and without foundation.

Appellees apparently overlook those portions of the depositions of James Brooks,[1] Burdett Lechner,[2] Gut Powell,[3] Peter Jackson[4] and John McMullen,[5] which they attached to their motion to dismiss. Additionally, the affidavits of John McMullen[6] and Larry Edfelt[7] were filed in the case #2295, along with the stipulation of facts.

Court opinions in Hjelle v. Brooks[8] and State v. Wakefield Fisheries, Inc.,[9] which have been cited by all parties to this law suit, provide a historical factual background of undisputed facts to this long-running controversy.

Additionally, the 1970 Annual Report of the

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1. R. 122-138 (Case #2444).
2. R. 161-172 (Case #2444).
3. R. 173-177 (Case #2444).
4. R. 178-180 (Case #2444).
5. R. 181-183 (Case #2444).
6. R. 33-47
7. R. 48-52
8. 377 F. Supp. 530 (D.C. Alaska 1974).
9. 495 P.2d 166 (Alaska 1973)

North Pacific Fisheries Commission on Crab in the Eastern Bering Sea[10] and publications by the Alaska Department of Fish and Game provide published[11] information which the court can rely on in reaching its decision.[12]

In any event, appellees have not been precluded from raising specific defenses based on matters not previously determined by the trial court.[13]

By Direction of the Court, It Is ORDERED:

The petition for rehearing is denied.

DATED at Juneau, Alaska, this 26th day of March, 1976.

_____
Justice

[Chief Justice Boochever and Justice Burke did not participate in consideration of the petition for rehearing.]

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10. See McMullen and Yoshihara, "King and Tanner Crab Fisheries of the United States in the Eastern Bering Sea, 1966-1970." Int. No. Pac. Fish. Comm., 1970 Annual Report, p. 104-110.

11. McMullen and Yoshihara, "The King and Tanner Crab Fishery of the Alaska Peninsula-Aleutian Islands Management Area, 1969-70," Alaska Department of Fish and Game, Info. Leaf. No. 148; McMullen, Yoshihara and Geiger, "The King Crab Fisheries of the Alaska Peninsula and Aleutian Islands, 1970-1971," Alaska Department of Fish and Game Info.Leaf. No. 157.

12. See also Reardon, "Alaska's King Crab Fishery," Alaska Magazine (March 1976).

13. See footnote 108, page 63, Opinion #1232

APPENDIX D

THE SUPREME COURT OF THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
KONRAD S. URI	)	No. 74,12,223 Cr.
PER NYMARK	)	No. 74.12,231 Cr.
ARNOLD RASMUSSEN	)	No. 74-12,217 Cr.
RONALD BEIRNES	)	No. 74-12,222 Cr.
BORGE H. MANNES	)	No. 74-12,219 Cr.
CARL PEROVICH	)	No. 74-12,224 Cr.
BJORN NYMARK	)	No. 74-12,221 Cr.
SVERRE A. YRI	)	No. 74-12,230 Cr.
OLE HENDRICKS	)	No. 74-12,233 Cr.
SIGMUND ANDREASSEN	)	No. 74-12,232 Cr.
CORY A. KALDESTAD	)	No. 74-12,274 Cr.
MICHAEL LYNCH, JR.	)	No. 74-12,218 Cr.
LARS MYHRE	)	No. 74-12,234 Cr.
TOM HAUGEN	)	No. 74-12,220 Cr.
EMIL VINBERG	)	No. 74-12,247 Cr.
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

The defendants are commercial fishermen charged with having violated various regulations of the State of Alaska purporting to govern the harvest of king crab in the Bering Sea. All of these offenses occurred, if at all, in "the hole area" some 16 to 60 miles off the coast of Alaska.

The defendants move to dismiss the complaints,

contending, in part, that the State of Alaska lacks jurisdiction to regulate the king crab fishery more than three (3) miles seaward of its shores.

At the outset, it is important to note that these cases do not involve the State's jurisdiction to enact and enforce so-called "landing laws". The charges in these cases specifically relate to conduct wholly occurring outside of Alaska's territorial waters.

Despite the disastrous consequences that may be in store for the king crab fishery and a substantial segment of Alaska's fishing community, I am forced to conclude that any attempt, by the State of Alaska, to regulate king crab fishing in the Bering Sea more than three miles from its shores, is in conflict with an area of exclusive federal jurisdiction and, therefore, prohibited by Article VI of the Constitutuion of the United States.

The Court hereby adopts and incorporates herein by reference, as the basis for its decision, the analysis and authorities cited in part II of defendants' Memorandum in Support of Motion to Dismiss, filed herein on October 2, 1974 (pp. 10-17).

Accordingly, defendants' motion to dismiss the complaints is granted upon the grounds stated. Having reached this conclusion, it is not necessary to decide the other issues raised by defendants' motion.

IT IS SO ORDERED.

DATED at Anchorage, Alaska, this 17th day of December, 1974.

EDMOND W. BURKE
Superior Court Judge

cc: Rozell
AG (Markham)

THE ATTEMPT BY THE STATE OF ALASKA TO REGULATE THE KING CRAB FISHERY IN THE BERING SEA CONFLICTS WITH AN AREA OF EXCLUSIVE FEDERAL JURISDICTION

While the State of Alaska was given certain proprietary rights within the three-mile belt as a result of the Submerged Lands Act passed in 1953, 43 U.S.C. 1301-15, Congress declared in the Outer Continental Shelf Lands Act, passed the same year, that seaward of the three-mile limit jurisdiction is federal rather than state.[5]

In Section 3 of the Outer Continental Shelf Act, it is stated:

> (a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control and power of disposition as provided in this subchapter." 43 U.S.C. 1332(a).

Thus far, it is clear that the state jurisdiction conferred by the Submerged Lands Act terminates at three miles and there federal jurisdiction commences. The Act is also careful to point out in 43 U.S.C. 1332(b) that the

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5. The Outer Continental Shelf Lands Act was preceded in 1945 with a Presidential Proclamation which stated:

> Having concern for the urgency of conserving and prudently using its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed on the Continental Shelf beneath the high seas but contiguous to the coast of the United States as appertaining to the United States, subject to its jurisdiction and control . . .

character as high seas of the water above the Continental Shelf and the right to navigation and fishing therein shall not be affected.

However, with regard to the seabed, subsoil and resources of the Shelf itself, including king crab, the Act creates a federal enclave. It is stated in 43 U.S.C. 1333(a)(1):

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state . . .[6]

(Emphasis added)

Subsection (2) of this section provides that the federal officers and courts may enforce the

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6. The text of this section was modified during the debate in Congress:

> In the matter inserted in the conference report, the jurisdiction and control of the United States is extended to the seabed and subsoil of the outer Continental Shelf adjacent to the shores of the United States instead of merely to the natural resources of the subsoil and seabed as in the original House version and also the the structures for their development such as artificial islands, drilling platforms, etc. Statement of House Manager, 1953 Congressional Record, House, 10419.

civil and criminal laws of each adjacent state of the United States as of August 7, 1953 on the Continental Shelf. (It is to be noted that the date of "adoption" of state law precedes the adoption of the quota in this case by 20 years.) Section (3) of the statute goes on to state that:

> The provisions of this section for adoption of State Law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

Thus, subsection (2) appears to be something in the nature of a federal assimilative crimes act for the federal enclave for the utilization of the state laws as of August 7, 1953. The regulations here, of course, could not be so assimilated because they did not exist (nor did the State of Alaska exist) as of August 7, 1953.[7] Moreover, the statute

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7. An earlier version of the statute did not set a time, i.e. August 7, 1953, as the deadline for the assimilation of state law. It read: "The laws of each coastal State which so provide shall be applicable . . ." 1953 Congressional Record--House 4891. The statute, as passed, read:

> The civil and criminal laws of each adjacent state as of August 7, 1953 are declared to be the law of the United States, . . .

There was considerable debate on this point in the Senate on constitutional grounds. Sen. Cordon stated:

> Sec. 4 of the bill takes care of all of those provisions. The enactment as Federal law by

clearly states that the state is to have no jurisdiction with respect to the "seabed, subsoil and natural resources" of the Outer Continental Shelf. Such a statement of exclusive federal jurisdiciton could be hardly more clear.

The Department of Justice felt strongly that the Outer Continental Shelf was an area of exclusive federal jurisdiction in its report to Congress prior to passage of the bill. As Senator Cordon stated to the Senate:

> On the other hand, as pointed out in the report made by the Department of Justice on S.1901, the area is one in which national and international problems intermingle. The Outer Continental Shelf is not and never has been within the boundary of any State or Territory, and it is, therefore, uniquely an area of exclusive Federal jurisdiction and control. The reports submitted on behalf of Attorney General Brownell stresses these two facts.
>
> The Department of Justice views are set forth in the committee report on S.1901, Report No. 411, and it is also found in the hearings on S. 1901, along with oral testimony of Mr. J. Lee Rankin, Assistant Attorney General of the

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7. (cont.)

> reference of the laws of the several abutting States meets the major constitutional objection, in that the laws so adopted are the laws as they exist at the time of enactment of S.1901. Only already existing State laws will become the law of the U.S., and amendatory legislation by the States thereafter will not be applicable unless made so by later Federal legislation.

1953 Congressional Record--Senate 6964.

> United States, which begins on page 625 of the hearings. The report of the Department states in part:
>
> This--that is, the outer Continental Shelf--is a Federal area, outside State boundaries, and to give the states a sort of extra territorial jurisdiction over it is unnecessary and undesirable. The situation is not comparable to that of federally owned areas within a State, as to which State law has some measure of applicability. Particularly in view of the intermingling of national and international rights in the area, it is important that the Federal Government which has the responsibility for handling foreign relations, have the exclusive control of lawmaking and law enforcement there.

1953 Congressional Record--Senate 6903.

In fact, an attempt by way of an amendment to the bill to extend state boundaries to the seaward extremity of the Outer Continental Shelf was rejected by the Senate. 1953 Congressional Record--Senate 7232, 7236.[8] During the debate over the amendment, Senator Cordon succinctly stated:

> Again, that is the heart of the problem before the Senate--one we have discussed over and over again. Either the outer Continental Shelf is territory where the sole jurisdiction, control and right to tax in any form is in the United States or it is not.

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8. The amendment was proposed by Senator Long. Another amendment proposed by Senator Ellender attempting to allow the states to extend their jurisdiction to the Continental Shelf had been previously rejected. 1953 Congressional Record--Senate 7228-7232.

Later Senator Cordon again made clear that the Act was to provide for exclusive federal jurisdiction:

> Senator Cordon: The difference between that situation (the Mineral Leasing Act) and the one presented by the Outer Continental Shelf is that, with respect to the Mineral Leasing Act, the lands to which the Act is applicable are within the boundaries of the state and there is a degree of state jurisdiction. With respect to the Outer Shelf lands, they are wholly outside the boundary of any state, and there is no jurisdiction on the part of any state. To that extent there cannot be an application of state law under state jurisdiction. The distinction is an important one which the Senator from Oregon would like to have the record show.
>
> Mr. Daniel: I should like to ask one further question. Is it the opinion of the Senator from Oregon that if the Secretary deems it advisable in carrying on this cooperation with the state agencies and officials, facilities and employees as may be made available to him?
>
> Mr. Cordon: Under existing law, yes, but with special regard to the fact that there is no state jurisdiction on the Outer Continental Shelf.

1953 Congressional Record--Senate 10472.

Having established that the jurisdiction of the federal government is exclusive with respect to the "natural resources" of the Outer Continental Shelf, the question becomes whether king crab are within those "natural resources". The answer that king crab are within the "natural resources" comes from not one but three sources.

First, the Submerged Lands Act, of which the Outer Continental Shelf Lands Act is regarded as

an amendment, specifies:

> The terms "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs . . . and other marine animal and plant life but does not include water power or the use of water for production of power . . .

(43 U.S.C. 1301(e); Emphasis supplied)

Second, in the Convention on the Continental Shelf, which was ratified by the United States in 1960 and by the Union of Soviet Socialist Republics in 1961, it is stated that:

> The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Article 2, Section 4, 1958 Geneva Convention.

Thus, while it might be arguable that the Convention is much narrower than the Submerged Lands Act in defining a "natural resource", crab would meet the definition of the "sedentary species" in that the crab is in "constant physical contact" with the seabed.

Third, this was later made clear by the Secretary of Commerce when he defined as required by 16 U.S.C. 1081 and 1085 the sedentary species of the CContinental Shelf. This definition was published in Title 50, Code of Federal Regulations, Subchapter J--The Continental Shelf, which states in pertinent part:

Section 295.1 Purpose.

The purpose of the regulations in this part is to list those species determined by the Secretary of Commerce, in consultation with the Secretary of State, to constitute a Continental Shelf fishery resource, i.e., living organisms belonging to the sedentary species, which at the harvestable stage, either are immobile or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil of the Continental Shelf.

Section 295.2 List of Species.

Crustacea

Dungeness Crab--Cancer magister.
Tanner Crab--Chionoecetes tanneri.
Tanner Crab--Chionoecetes opilio.
Tanner Crab--Chionoecetes angulatus.
Tanner Crab--Chionoecetes bairdi.
King Crab--Paralithodes camtschatica.
King Crab--Paralithodes platypus.
King Crab--Paralithodes brevipes.
California King Crab--Paralithodes rathbund.
California King Crab--Paralithodes californiensis.
Golden King Crab--Lithodes aequispinus.
Northern Stone Crab--Lithodes maia.
Stone Crab--Menippe mercenaria.
Deep-sea Red Crab--Geryon quinquendens.

The regulations, constituting an attempt to invade an area under exclusive federal jurisdiction, must fail under the supremacy caluse, Article VI, Clause 2 of the Constitution of the United States. Campbell v. Hussey, 368 U.S. 297 (1961); Hood v. Du Mond, 336 U.S. 525 (1948); Hines v. Davidowitz, 312 U.S. 52, 85 L. Ed 581 (1941); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

In the Campbell case, state tobacco regulations were struck down even though not inconsistent with

federal standards because the federal standards were the "official standards of the United States" and state regulations could not be permitted even as supplemental to those federal standards. In Rice v. Santa Fe Elevator Corp., supra, the court struck down the state regulations in a field which the states have traditionally occupied (warehousing) where the United States Warehousing Act provided that the "power, jurisdiction and authority" of the Secretary of Commerce "shall be exclusive with respect to all persons."[9] In Missouri Pacific Railroad Co. v. Porter, 273 U.S. 341 (1927), a state statute concerning shipment on bills of lading was struck down as it would not be allowed to be

> . . . in coincidence with as complimentary to or as in opposition to the intention of Congress to enter a field that is within its jurisdiction.

Accordingly, the State of Alaska has no jurisdiction on the Outer Continental Shelf pursuant to the Supremacy Clause, Article VI, Clause 2, of the Constitution of the United States.

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9. While warehousing licensing with a state might be a matter for traditional local concern and legislation there seems to be no history of regulation outside a state's territories; except of course with respect to State residents. Cf. Skiriotes v. Florida, 313 U.S. 69 (1941).

APPENDIX E

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant, v. KONRAD S. URI, et. al., Appellees.	)	File No. 2435
STATE OF ALASKA, Appellant, v. CORY A. KALDESTAD, Appellee.	)	File No. 2444

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that KONRAD S. URI, PER NYMARK, ARNOLD RASMUSSEN, RONALD BEIRNES, BORGE H. MANNES, CARL PEROVICH, BJORN NYMARK, SVERRE A YRI, OLE HENDRICKS, SIGMUND ANDREASSEN, CORY A. KALDESTAD, MICHAEL LYNCH, JR., LARS MYHRE, THOMAS HAUGAN and EMIL VINBERG, the Appellees above-named, hereby appeal to the Supreme Court of the United States from the final judgment of this court dated January 19, 1976 reversing the judgment of the trial court, from the order denying the petition for rehearing dated and entered the

26th day of March, 1976, and from the Mandate dated and entered April 2, 1976 and from the whole thereof.

This appeal is taken pursuant to Title 28, United States code, Section 1257(2).

The Clerk will please certify and transmit the record to the Supreme Court of the United States.

The following are questions presented by this appeal:

1. Whether the jurisdiction of the State of Alaska is limited to three miles from shore and any sovereignty beyond that point is vested exclusively in the federal government.

2. Whether the federal government has exclusive jurisdiction of the resources of the Continental Shelf, including crab.

3. Whether the State of Alaska is prohibited from assuming jurisdiction over international waters in the Bering Sea.

4. Whether enforcement of Alaska's fishing statutes outside Alaska territory can be supported by a landing law.

5. Whether Alaska may regulate and control fishing by citizens of other states outside Alaska's territory.

6. Whether enforcement of Alaska law as to king crab in the Bering Sea outside Alaska's territory is volative of the Supremacy Clause, Article VI, Clause 2, the Commerce Clause, Article I, Section 8, and the Due Process Clause, Amendment Fourteen of the Constitution of the United States.

DATED this 7th day of May, 1976.

MORIARTY, LONG, MIKKELBORG & BROZ

By:_____
Douglas M. Fryer

FAULKNER, BANFIELD, DOOGAN & HOLMES

By:_____
William B. Rozell
Attorneys for Appellees

PROOF OF SERVICE

I, DOUGLAS M. FRYER, one of the attorneys for Appellees herein, a member of the bar of the Supreme Court of the United States, hereby certify that on the 7th day of May, 1976, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States, on the several parties thereto as follows:

1. On the State of Alaska by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to

Gerald W. Markham, Esq.
Assistant Attorney General
Office of Attorney General
Anchorage Civil Section for
the State of Alaska
360 "K" Street, Suite 105
Anchorage, Alaska 99501

2. Solicitor General
Department of Justice
Washington, D. C.

3. Office of the Attorney General
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Attn: Evelle J. Younger, Carl Boronkay
and Roderick Walston

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Washington 98154

APPENDIX F

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES AND REGULATIONS INVOLVED IN THE CASE

CONSTITUTION OF THE UNITED STATES

Article I, Section 8

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; . . .

To regulate commerce with foreign nations, and among the severfal states, and with the Indian tribes;

Article VI, Clause 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

Fourteenth Amendment, Section 1

Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall anystate deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL ACTS

Alaska Statehood Act (July 7, 1958)

72 Stat. 339

Sec. 6(m) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

Submerged Lands Act (May 22, 1953)

43 U.S.C. Sections 1301-1315

43 U.S.C. Section 1301(a) The term "lands beneath navigable waters" means:

(2) all lands permanently or periodically covered by tidal water up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends SEAWARD (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boun-

daries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

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(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

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(g) The term "State" means any State of the union;

43 U.S.C. 1302. Resources seaward of the Continental Shelf.

Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the ara of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed. May 22, 1953, c. 65, Title II,

Section 9, 67 Stat. 32.

43 U.S.C. 1311. Rights of the States--Confirmation and establishment of title and ownership of lands and resources; management, and administration, leasing, development, and use

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective grantees, lessees, or successors in interest thereof;

(b)(1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvments, and natural resources; . . .

***

(d) Nothing in this chapter shall affect the use, development, improvment, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of

Congress to regulate or improve navigation, or to provide for flood control, or the production of power; . . .

43 U.S.C. Section 1312. Seaward boundaries of States

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress. May 22, 1953, c. 65, Title II, Section 4, 67 Stat. 31.

43 U.S.C. Section 1314. Rights and powers retained by the United States; purchase of natural resources; condemnation of lands

(a) The United States retains all its

navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

Outer Continental Shelf Lands Act (August 7, 1953)

43 U.S.C. 1331-1343

43 U.S.C. 1331. Definitions

When used in this subchapter--

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(b) The term "Secretary" means the Secretary of the Interior;

43 U.S.C. 1332. Congressional declaration of policy; jurisdiction; construction

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its

jurisdiction, control and power of disposition as provided in this subchapter.

(b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected. Aug. 7, 1953, c. 345, Section 3, 67 Stat. 462.

Section 1333. Laws and regulations governing lands--Constitution and United States laws; laws of adjacent States; publication of projected States lines; restriction on State taxation and jurisdiction

(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: Provided, however, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental shelf, and artificial islands and fixed structures erected thereon, which would be within the area of

the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

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43 U.S.C. 1334. <u>Administration of leasing--Rules and regulations; amendment; cooperation with State agencies; violations and penalties; compliance with regulations as condition of lease</u>

(a)(1) The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other

provisions herein, such as rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of conservation laws, rules, and regulations the Secretary is authorized to cooperate with the conservation agencies of the adjacent States. Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, in the interest of conservation, for unitization, pooling, drilling agreements, suspension of operations or production, reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operations or production.

(2) Any person who knowingly and willfully violates any rule or regulation prescribed by the Secretary for the prevention of waste, the conservation of the natural resources, or the protection of correlative rights shall be deemed guilty of a misdeameanor and punishable by a fine of not more than $2,000 or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day of violation shall be deemed to be a separate offense. The issuance and continuance in effect of any lease, or of any extension, renewal, or replacement of any lease under the provisions of this subchapter shall be conditioned upon compliance with the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease

if the lease is ussed under the provisions of section 1337 of this title, or with the regulations issued under the provisions of section 1335(b)(2) of this title if the lease is maintained under the provisions of section 1335 of this title.

Cancellation of lease; judicial review

(b)(1) Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335(b)(2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in section 1337(j) of this title, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(2) Whenever the owner of any producing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335(b)(2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of section 1333(b) of this title.

Prohibition of Foreign Fishing Vessels in the Territorial Waters of the United States (16 USC 1081-1085 [1964])

16 USC 1081. Prohibition against fishing in territorial waters; exceptions

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishery fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of

registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

Historial Note -- Transfer of Functions. Secretary of Commerce was substituted for Secretary of the Interior in view of: the creation of the National Oceanic and Atmospheric Administratin in the Department of Commerce and the Office of Administrator of such Administration; the abolition of the Bureau of Commercial Fisheries in the Interior Department and the office of Director of such Bureau; transfers of functions, including functions formerly vested in law in the Secretary of the Interior or the Interior Department which were administered through the Bureau of Commerical Fisheries or were primarily related to such Bureau, exclusive of certain enumerated functions with respect to Great Lakes fishery research, Missouri River Reservoir research, Gulf Breeze Biological investigations; and transfer of marine sport fish program of Bureau of Sport Fisheries and Wildlife by 1970 Reorg. Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84

Stat. 2090, set out in the Appendix to Title 5, Government Organization and Employees.

16 U.S.C. 1085. Definitions

(a) As used in this chapter, the term "Continental Shelf fishery resource" means living organisms belonging to sedentary species; that is to say, organisms, which at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil of the Continental Shelf, including the following species:

CRUSTACEA

Tanner Crab--Chionoecetes tanneri;
Tanner Crab--Chionoecetes opilio;
Tanner Crab--Chionoecetes angulatus;
Tanner Crab--Chionoecetes bairdi;
King Crab--Paralithodes camtschatica;
King Crab--Paralithodes platypus;
King Crab--Paralithodes brevipes;
Stone Crab--Menippe mercenaria;
Lobster--Homarus Americanus;
Dungeness Crab--Cancer magister;
California King Crab--Paralithodes californiensis;
Golden King Crab--Lithodes aequispinus;
Northern Stone Crab--Lithodes maia;
Stone Crab--Menippe mercenaria; and
Deep-sea Red Crab--Ceryon quinquendens.

MOLLUSKS

Red Abalone--Haliotis rufescens;
Pink Abalone--Haliotis corrugata;
Japanese Abalone--Haliotis kamtschatkana;
Queen Conch--Strombus gigas;
Surf Clam--Spisula solidissima; and
Ocean Quahog--Artica islandica.

SPONGES

Glove Sponge--Hippiospongia canaliculata;
Sheepswool Sponge--Hippiospongia lachne;
Grass Sponge--Spongia graminea;
Yellow Sponge--Spongia barbera.

(b) The Secretary of Commerce, in consultation with the Secretary of State, is authorized to publish in the Federal Register additional species of living organisms covered by the provisions of subsection (a) of this section.

(c) As used in this chapter, the term "fisheries" means the taking, planting, or cultivation of fish, mollusks, crustaceans, or other forms of marine animal or plant life by any vessel or vessels; and the term "fish" includes mollusks, crustaceans, and all other forms of marine animal or plant life.

(d) As used in this chapter, the term "Continental Shelf" refers (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Fisheries Zone Contiguous to Territorial Sea of United States [16 U.S.C. 1091-94 (1966)]

16 U.S.C. 1091. Establishment; fisheries rights

There is established a fisheries zone contiguous to the territorial sea of the United States. The United States will exercise the

same exclusive rights in respect to fisheries in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States.

16 U.S.C. 1092. Description of boundaries

The fisheries zone has as its inner boundary the outer limits of the territorial sea and as its seaward boundary a line drawn so that each point on the line is nine nautical miles from the nearest point in the inner boundary.

16 U.S.C. 1094. State jurisdiction over natural resources and waters

Nothing in this chapter shall be construed as extending the jurisdiction of the States to the natural resources beneath and in the waters within the fisheries zone established by this chapter or as diminishing their jurisdiction to such resources beneath and in the waters of the territorial seas of the United States.

FEDERAL REGULATIONS

Title 50, Code of Federal Regulations
Subchapter J - Continental Shelf

AUTHORITY: The provisions of this Part 295 issued under 78 Stat. 196, 16 U.S.C. 1085, as modified by Reorganization Plan No. 4 of 1970.

Section 295.1. Purpose.

The purpose of the regulations in this part is to list those species determined by the Secretary of Commerce, in consultation with the Secretary of State, to constitute a Continental Shelf fishery resource, i.e., living organisms belonging to sedentary species, which at the harvestable stage, either are

immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil of the Continental Shelf.

(36 F.R. 11923, June 23, 1971)

Section 295.2. List of species.

COELENTERATA

Precious Red Corals--Corallium spp.
Black Coral--Antipathes grandis.

CRUSTACEA

Dungeness Crab--Cancer magister.
Tanner Crab--Chionoecetes tanneri.
Tanner Crab--Chionoecetes opilio.
Tanner Crab--Chionoecetes angulatus.
Tanner Crab--Chionoecetes bairdi.
King Crab--Paralithodes camtschatica.
King Crab--Paralithodes platypus.
King Crab--Paralithodes brevipes.
California King Crab--Paralithodes rathbund.
California King Crab--Paralithodes californiensis.
Golden King Crab--Lithodes aequispinus.
Northern Stone Crab--Lithodes maia.
Stone Crab--Menippe mercenaria.
Deep-sea Red Crab--Geryon quinquedens.

Presidential Proclamation, September 28, 1945,
Regarding the Continental Shelf

WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and seabed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contigent upon cooperation and protection from the shore, since the continental shelf may be regarded as

an extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources;

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and seabed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as highs seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

Executive Order No. 9633, 28 Sept. 1945,
1945 AMC 1367, 10 Federal Register 12305

TREATIES

Convention on the Continental Shelf (1958)

Article 1

For the purpose of these articles, the term "continental shelf" is used as referring (a)

to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Article 2

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or maked a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effect or notional, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Article 3

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

***

Article 5

1. The exploitation of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

Ratified by United States 1960
Ratified by USSR 1961

Agreement Between the Government of the United States of American and the Government of the Union of Soviet Socialist Republics Relating to Fishing for King and Tanner Crab

The Government of the United States of America and the Government of the Union of Soviet Socialist Republics,

Having considered in a spirit of mutual understanding their problems relating to the king and tanner crab fisheries on the continental shelf in light of their ratifications of the Convention on the Continental Shelf adopted at Geneva, 1958,

Taking into account the existing fishery of the Soviet Union for king and tanner crab in the

eastern Bering Sea, and

Desiring to adopt the necessary measures for conserving the stocks of king crab and tanner crab in the fisheries areas provided for by the Agreement,

Have agreed as follows:

1. The king crab and tanner crab are natural resources of the continental shelf over which the coastal state exercises sovereign rights for the purposes of exploration and exploitation in accordance with the provisions of Article 2 of the Convention on the Continental Shelf.

2. Nationals and vessels of the Soviet Union may continue to carry out fishing for king and tanner crab on the continental shelf of the United States for a period of two years in that area of the eastern Bering Sea described in the Appendix to this Agreement, provided that the annual commercial catch of king crab and tanner crab by Soviet nationals and vessels in such area shall not exceed 260,000 king crabs and 4.2 million tanner crabs each in 1973 and 1974.

3. Each Government will apply the measures specified in paragraphs 3 and 4 of the Appendix to this Agreement to its nationals and vessels engaged in the king and tanner crab fisheries in the eastern Bering Sea. Either Government shall, if requested by the other Government,. provide opportunity for observation of the conduct of enforcement of the provisions of this Agreement and for that purpose shall permit duly authorized officers of the other Government to board its vessels engaged in the king and tanner crab fisheries in the eastern Bering Sea. These officers will make a report on the results of their observations; the report will be forwarded to the flag Government for

appropriate action, if such action should be necessary.

4. The two Governments will continue and intensify their study of the king and tanner crab resources in the eastern Bering Sea and will exchange annually by November 30 the data resulting from such study including also, to the extent possible, an estimate of the maximum sustainable yield of the resources. The data to be furnished by each Government may be prepared in accordance with its own methodology and shall include, but not be limited to, the categories of data described in the Appendix to this Agreement. The two Governments will also provide for the exchange of scientific personnel engaged in the study of the king crab and tanner crab resources.

5. This Agreement shall replace the Agreement of February 5, 1965 between the two Governments relating to fishing for king crab, as amended and extended by the Agreements of February 13, 1967; January 31, 1969; and February 12, 1971; and extended by an exchange of notes dated December 31, 1972. It shall enter in force upon signature and shall remain in force for two years. At the request of either Government, representatives of the two Governments will meet at a mutually convenient time with a view to modifying the present Agreement. In any event, representatives of the two Governments will meet at a mutually convenient time prior to the expiration of the period of validity of this Agreement to review the operation of the Agreement and to decide on future arrangements.

IN WITNESS WHEREOF the undersigned, being duly authorized for this purpose, have signed this Agreement.

DONE at Moscow, February 21, 1973, in duplicate, in the English and Russian languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:	FOR THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS:
/s/	/s/

APPENDIX

1. The area referred to in paragraph 2 of the Agreement is that portion of the southeastern Bering Sea lying seaward of the nine-mile zone contiguous to the territorial sea of the United States west of 160° West Longitude.

2. The annual commercial catch of king crab and tanner crab by Soviet nationals and vessels referred to in paragraph 2 of the Agreement shall not exceed:

a. 100,000 king crabs and 1.8 million tanner crabs in the area lying within the following designated boundaries: a line running from Cape Newenham on the Bering Sea coast of western Alaska, southwest to position 57°00′ North Latitude, 168°00′ West Longitude, thence due south to position 54°36′ North Latitude, 168° West Longitude, and thence east to Cape Sarichef on the west coast of Unimak Island, Alaska.

b. 160,000 king crabs and 2.4 million tanner crabs in the area adjacent to the coast of the United States north and west of the area designated in subparagraph a.

3. a. Female king and tanner crabs, king crabs less than 15.8 cms. in maximum carapace width, and soft-shelled king and tanner crabs

shall not be retained and used. Any such crabs taken incidentally, any king crabs taken in excess of the agreed quotas in each of the areas, and any tanner crabs taken in excess of the agreed quotas in each of the areas shall be returned immediately to the sea with a minimum of injury.

b. King crabs and tanner crabs shall not be taken by means of fishing gear other than pots.

4. Unless otherwise agreed by the two Governments, only pots may be used to capture king crabs and tanner crabs for commercial purposes and no trawling may be conducted for other species in that area lying seaward of the nine-mile zone contiguous to the territorial sea of the United States within the following boundaries: a line running from a point on the Bering Sea coast of the Alaska Peninsula due west along 55°54′ North Latitude to its intersection with a line connecting two points 56°20′ North Latitude, 163°00′ West Longitude, and 55°16′ North Latitude, 166°10′ West Longitude, thence southwesterly along the said line to its intersection with a line passing between Cape Navarin and Cape Sarichef at 55°16′ North Latitude, 166°10′ West Longitude, thence southeasterly along the Cape Navarin-Sarichef line to Cape Sarichef.

5. The data referred to in paragraph 4 of the Agreement are:

a. Biological Data.

(1) Tag returns: tag number and/or tag; date and location of capture (latitude and longitude); sex, length, width, and weight of crab; condition of shell.

(2) Life history data: length, width,

weight, and age of crab by sex; moult data; breeding habits, feeding habits, migration habits.

(3) Publications dealing with king crabs and tanner crabs in the Bering Sea and North Pacific.

b. Catch Statistics.

Total annual and monthly catches by 1^{o} of longitude.

c. Effort Statistics.

(1) Description of pots; number of pot lifts per month by 1^{o} of longitude.

(2) Number of fleets operated by dates of operations; number of pot boats.

d. Production Statistics.

(1) Canned crab: number of cases, number of crabs per case, quantity of meat per case.

(2) Frozen crab: description of units and number of units; number of crabs.

ALASKA STATUTES

Sec. 16.10.180. Legislative findings. The legislature finds and recognizes these facts:

(1) Migratory fish and migratory shellfish are present in commercial quantities inside and outside the territorial waters of the state.

(2) Migratory fish and migratory shellfish taken from the waters of the state are indistinguishable, in most cases, from those taken

from the adjacent high seas.

(3) Substantial quantities of migratory fish and migratory shellfish move inshore and offshore intermittently and at various times during a given year and in so doing often enter and leave territorial waters of the state.

(4) To conserve the migratory fish and migratory shellfish found inside the waters of the state it is necessary to strictly enforce local laws and regulations.

(5) By making certain laws and regulations passed or promulgated for the regulation of the coastal fishery applicable to the adjacent high sea areas, enforcement of these laws and regulations is facilitated.

(6) Conservation regulations should not be promulgated to impose economic sanctions.

Sec. 16.10.190. Regulations. The board may promulgate rules and regulations to carry out the purposes of sections 180-230 of this chapter defining the adjacent high sea areas, migratory fish and migratory shellfish and to make coastal fishery rules and regulations governing the manner, means, conditions and time for the taking of migratory fish and migratory shellfish applicable in designated adjacent high sea areas.

Sec. 16.10.200. Unlawful taking prohibited. It is unlawful for a person taking migratory fish and migratory shellfish in high seas areas designated by the board or in violation of the rules and regulations promulgated by the board governing the taking of migratory fish and migratory shellfish in the designated areas to possess, sell, offer to sell, barter, offer to barter, give or transport in the state,

including the waters of the state, migratory fish or migratory shellfish.

Sec. 16.10.210. Unlawful sale or offer prohibited. It is unlawful for a person to possess, purchase, offer to purchase, sell, or offer to sell in the state migratory fish or migratory shellfish taken on the high seas knowing that they were taken in violation of a rule or regulation promulgatged by the board governing the taking of migratory fish or migratory shellfish in certain areas designated by the board or the commissioner.

Section 16.10.220. Penalties for violation of Sections 200 and 210 of this chapter. A person who violates sections 200 and 210 of this chapter is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than $5,000, or by imprisonment for not more than one year, or by both.

REGULATIONS OF THE ALASKA BOARD OF FISH AND GAME

Regulations in effect in November 1973 during the alleged violations by defendant Bundrant. These were enjoined in Hjelle v. Brooks, 377 F.Supp. 430 (D.Ak. 1974) and later repealed

5 AAC 36.040 (REPEALED). Transportation and possession of shrimp, scallops and king, dungeness or tanner crabs

It is unlawful to possess, sell, offer to sell, barter, offer to barter, give or transport, purchase or offer to purchase within the state, including the waters of the state any shrimp, scallops or king, dungeness, or tanner crab taken contrary to or in violation

of the rules and regulations promulgated by the board, if said shrimp, scallops or crabs are taken in any waters seaward of that officially designated as the territorial waters of Alaska to a depth of 200 meters, or beyond that limit, to where the depth of the superjacent waters admits the exploitation of these shrimp, scallops or crabs and for the Kodiak and Cook Inlet areas if said shrimp, scallops or crabs are taken in the following waters:

(1) in Kodiak area, an area bounded by a line beginning at the southern entrance of Imuya Bay near Kilokak Rocks to a point southwest of Chirikof Island at 55°31′ N. lat., 156°26′′ W. long., then east to a point at 55°31′ N. lat., 151°05′ W. long., then northeast to a point east of the Barren Islands at 58°52′ N. lat., 148° W. long., then west to Cape Douglas at 58°52′ N. lat., 153°15′30" W. long.;

(2) in the Cook Inlet area, an area bounded by a line beginning at Cape Douglas at 58°52′ N. lat., 153°15′30" W. long., then east to a point at 58°52′ N. lat., 148°50′ W. long., then north to Cape Fairfield on the mainland of Alaska.

5 AAC 07.760 (REPEALED). Quotas

In the king crab fishery, the fishing season will be closed when, during the period June 15 through March 31, a quota of 23,000,000 pounds of king crab has been taken.

Regulations adopted on June 15, 1974 and repealed on June 25, 1974.

5 AAC 34.035(c)(5) (REPEALED). Closure of registration areas

(c)(5) the proportion of immature or soft-shell king crab being landed;

5 AAC 34.095(c) (REPEALED). Unlawful possession of king crab pots

(c) For purposes of this section, a king crab pot in an "operable condition" is a king crab pot which does not have the doors secured fully open, the bait and bait containers removed, and the lines disconnected.

5 AAC 34.910 (REPEALED). Fishing seasons

(a) Red and brown king crab may be taken from July 1 through April 15, unless the registration area is closed earlier by emergency order.

(b) Blue king crab may be taken from July 1 through June 15, unless the registration area is closed earlier by emergency order.

Regulations in effect in November 1973 and still in effect.

5 AAC 36.010. Description of area

The International Water area includes all waters outside Alaska's three mile limit, i.e., beyond those described in 5 AAC 39.975(13).

5 AAC 39.975(13). . . . "waters of Alaska" means the waters north and west of the International Boundary at Dixon Entrance including those extending three miles seaward:

(a) from the coast;

Regulations adopted June 15, 1974 and still in effect.

5 AAC 34.005. Statistical areas established

(a) For the king crab fishery, there are established the following statistical areas with the following code letters:

Code Letter

AD - the waters specified in sec. 100 of this chapter
E - the waters specified in sec. 200 of this chapter
H - the waters specified in sec. 300 of this chapter
K - the waters specified in sec. 400 of this chapter
LM - the waters specified in sec. 500 of this chapter
O - the waters specified in sec. 600 of this chapter
R - the waters specified in sec. 700 of this chapter
S - the waters specified in sec. 800 of this chapter
Q - the waters specified in sec. 900 of this chapter

(b) Each statistical area consists of:

(1) a registration area, comprised of all the waters within the statistical area which are waters subject to the jurisdiction of the state; and

(2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting waters subject to the jurisdiction of the state.

5 AAC 34.035. Closure of registration areas

(a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through the use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration, he shall close the registration area by emergency order.

(c) In determining whether to close a registration area, the commissioner shall consider all appropriate factors to the extent there is information available on such factors. Factors which may be considered include:

(1) the effect of overall fishing within the statistical area encompassing the registration area;

(2) catch per unit of effort and rate of harvest;

(3) relative abundance of king crab

within the area in comparison with pre-season expectations of the department;

(4) such guideline harvest levels as may be promulgated by regulation;

. . . .

(6) general information on the condition of king crab within the area; and

(7) information pertaining to the maximum sustainable yield level of king crab within the registration area.

(d) Within five days after the closure of any registration area, the owner of any vessel registered for that area may formally request the commissioner to reopen the area. The commissioner shall personally review pertinent information on the condition of king crab within the area, and shall formally announce his decision within 14 days of the receipt of the request.

(e) After the closure of any registration area, no vessel registered for that area may bring king crab into waters subject to the jurisdiction of the state unless:

(1) the vessel is validly registered for another registration area and the season is open in the area; and

(2) the vessel is otherwise in compliance with secs. 020 and 030 of this chapter.

5 AAC 34.090. Unlawful possession of king crab or king crab gear

(a) It is unlawful for any person to possess unprocessed king crab aboard a vessel licensed as a commercial fishing vessel within any regis-

tration area unless the vessel is validly registered for the area and the season is open, or unless the person is acting pursuant to the authorization of sec. 030(d) of this chapter. This prohibition shall not apply to king crab possessed for subsistence purposes if otherwise consistent with applicable regulations.

(b) It is unlawful for any person to possess aboard a vessel licensed as a commercial fishing vessel within any registration area any king crab or any gear (including aggregate amounts of gear) used in the taking of king crab which are prohibited by other regulations in this chapter governing such registration area.

(c) It is unlawful for any person to possess, purchase, sell, barter, or transport king crab within the state or within waters subject to the jurisdiction of the state if that person knows or has reason to know that such king crab were taken or possessed in contravention of the regulations of this chapter.

5 AAC 34.095. Unlawful possession of king crab pots

(a) It is unlawful for any person to possess any king crab pots in an operable condition within any registration area unless:

(1) the person is aboard a vessel registered for that area and the season is open; or

(2) the person is acting pursuant to the authorization of sec. 030(d) of this chapter; or

(3) the person is using such gear in the taking of king crab for subsistence purposes in accordance with applicable regulations.

(b) For purposes of this section, a registration area which has been partially closed pursuant to sec. 040 of this chapter shall be considered an area where the season is open.

. . . .

5 AAC 34.098. Violation of regulations

It is unlawful for any person to violate any of the regulations of this chapter.

5 AAC 34.900. Description of statistical area

Statistical area Q includes the waters of the Bering Sea and Chukchi Sea including all tributary bays except Bechevin Bay and Isanotski Strait (as described in 5 AAC 34.500), north of 54°36′ N. lat., (the latitude of Cape Sarichef).

5 AAC 34.920. Size limits

(a) King crab 6-1/4 inches or larger in width of shell may be taken or possessed during the open season between November 1 and the last day of February.

(b) King crab 6-1/4 inches or larger in width of shell may be taken or possessed during the open season between March 1 and October 31.

Regulations adopted June 25, 1974 and still in effect

5 AAC 34.035(c)(5). Closure of registration areas

(5) the proportion of immature or softshell king crab being handled

5 AAC 34.095(c). Unlawful possession of king crab pots

(c) For purposes of this section, a king crab pot in an "operable condition" is a king crab pot which does not have the doors secured fully open and the bait and bait containers removed.

5 AAC 34.910. Fishing seasons

(a) The fishing season shall be opened by emergency order issued by the commissioner, except that the commissioner shall not open the season prior to July 1. The commissioner shall announce the emergency order opening the season at least 72 hours prior to the time the season is to open.

(b) Red and brown king crab may be taken from the date the season is opened by emergency order through April 15, unless the registration area is closed earlier by emergency order.

(c) Blue king crab may be taken from the date the season is opened by emergency order through June 15, unless the registration area is closed earlier by emergency order.

APPENDIX G

Letterhead Stationary of
State of California
Office of the Attorney General
Department of Justice
EVELLE J. YOUNGER
Attorney General
State Building, San Francisco 84102
(415) 557-3920
June 4, 1976

James M. Johnson, Esq.
Assistant Attorney General
Temple of Justice
Olympia, Washington 98504

Re: Official Position of the State of California with Respect to Extra-territorial Regulations

Dear Mr. Johnson:

The official position of California, as expressed in pending litigation by the California Attorney General, is that all coastal states have the right to regulate fishing by citizens of the United States in waters beyond the territorial limits of the coastal states, in instances where such coastal states have a "legitimate interest" in limiting such fishing. The right of any such coastal state to regulate such fishing is not limited to the citizens or residents of that state, but extends to citizens and residents of other states as well. The right of such states to regulate such fishing, with respect to citizens and residents of that particular state, is firmly established in Skiriotes v. Florida, 313 U.S. 69 (1941). The right of a coastal state to regulate such fishing, with respect to citizens and residents of other states, must necessarily follow from the Skiriotes decision, for otherwise citizens

of the United States fishing in a particular area would be subject to differing regulations; this result, we believe, is not justified nor necessitated by any provision of the United States Constitution. However, no such coastal state can regulate fishing by citizens of other nations, since any such regulation would interfere with the exclusive constitutional power of the Federal Government to conduct foreign affairs.

Very truly yours,

EVELLE J. YOUNGER
Attorney General

s/ Roderick Walston
RODERICK WALSTON
Deputy Attorney General

RW:gj

APPENDIX H

Letterhead Stationary of
State of Oregon
Robert W. Straub, Governor
Department of Fish and Wildlife
Office of the Director
1634 S.W. Alder Street
Portland, Oregon 97207
June 3, 1976

Mr. Don Moos, Director
Washington Department of Fisheries
115 General Administration Building
Olympia, Washington 98501

Dear Don:

We are most unhappy to learn that the Thurston County Superior Court invalidated the troll regulations recently adopted by the Washington Department of Fisheries.

Oregon has adopted troll regulations for 1976, applicable to the ocean north of Tillamook Head, which require the use of barbless hooks and a minimum length of 28 inches for chinook salmon. Oregon will also require a two-week closure in June. Copies of our regulations are attached.

We feel that not only are those regulations necessary to comply with Judge Belloni's decision in Sohappy v. Smith, but also they are essential as a conservation measure to protect immature fish and lessen shaker mortality.

Oregon intends to enforce its regulations with respect to all Oregon citizens, regardless of which state's coastal waters they may be fishing in. Oregon also intends to enforce its regulations against all persons holding Oregon commercial fishing licensed or fishing out of Oregon ports. Our

authority to do this is spelled out in the recent decision of the Alaska Supreme Court in Alaska v. Bundrant, et al., and the many cases cited therein.

Sincerely yours,

s/ John W. McKean
John W. McKean
Director

rmd
Enc.

APPENDIX I

Introduced: 1/29/75
Referred: Resources

BY NAUGHTON, ANDERSON, BEIRNE BOWMAN, BRADNER, BROWN, BUCHHOLDT, COWPER, DUNCAN ELIASON, FINK, GARDINER, GRUENING, GUY, HAUGEN, ITTA, MCKINNON, MALONE, MILLER, OSTERBACK, OSTROSKY, PARKER, RHODE, SPECKING AND SULLIVAN

IN THE HOUSE

HOUSE CONCURRENT RESOLUTION NO. 4

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINTH LEGISLATURE - FIRST SESSION

Requesting increased and expanded protection for the state's fish and shellfish resources.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS valuable fish and shellfish resources adjacent to Alaska are being subjected to an intensive fishery by nonresident fishermen; and

WHEREAS many nonresident fishermen, particularly in the Bering Sea, are attempting to circumvent fish and shellfish conservation and management measures of the Board of Fish and Game in order to obtain private economic gain at the expense of the resources; and

WHEREAS those nonresident fishermen are demonstrating gross disregard for the future maintenance and sustained yield of fish and shellfish resources and constitute a serious and continuing threat to those resources; and

WHEREAS those non resident fishermen are jeopardizing the future livelihood of Alaskan fishermen and of law-abiding nonresident fishermen;

BE IT RESOLVED that the Ninth Alaska State Legislature respectfully requests the Governor to direct the appropriate state agencies to

(1) continue vigilant enforcement of the landing law and all other legally justifiable regulatory measures for the protection of fish and shellfish resources;

(2) refuse, where constitutionally and legally permissible, to extend privileges or services of the state to nonresident fishermen who disregard the conservation and management measures of the Board of Fish and Game;

(3) actively pursue negotiations with appropriate agencies of the federal government in order to bring about the application of any regulatory measures or other controls available under federal authority which can be utilized to resolve the nonresident fishing problem, if these measures or other controls are consistent with the maintenance of the state's primary management responsiblity over fish and shellfish resources;

(4) continue to defend conservation and management regulations of the Board of Fish and Game in the courts where these regulations are challenged or violated;

(5) maintain a policy of refusing to submit to threats or to political pressures exerted by nonresident fishermen determined to preclude Alaska's regulation and conservation of adjacent fish and shellfish resources;

(6) refuse to negotiate with, recognize, or otherwise deal with organizations of non-

resident fishermen aimed at avoiding responsiblity regarding the continued maintenance of fish and shellfish resources, such as the so-called Shellfish conservation Institute, except to the extent that it may directly further state interests; and

(7) use other means and measures directed towards insuring that fish and shellfish resources adjacent to Alaska are not destroyed or degraded.

APPENDIX J

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant, v. CHARLES BUNDRANT, Appellee.	File No. 2295
STATE OF ALASKA, Appellant, v. KONRAD S. URI, et. al., Appellees.	File No. 2435
STATE OF ALASKA, Appellant, v. CORY A. KALDESTAD, Appellee.	File No. 2444 ORDER

Upon consideration of the motion for stay of trial pending appeal to the United States Supreme Court,

By Direction of the Court, IT IS HEREBY ORDERED:

The motion is granted and the trial is stayed pending appeal to the United States Supreme Court.

Dated this 26th day of May, 1976.

s/ Donna Sprague Pegues
Clerk of Supreme Court

Supreme Court, U. S.
FILED
AUG 18 1976
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1873

KONRAD S. URI, PER NYMARK, ARNOLD RASMUSSEN, RONALD BEIRNES, BORGE H. MANNES, CARL PEROVICH, BJORN NYMARK, SVERRE A. YRI, OLI HENDRICKS, SIGMUND ANDREASSEN, CORY A. KALDESTAD, MICHAEL LYNCH, JR., LARS MYHRE, THOMAS HAUGAN and EMIL VINBERG,

Appellants,

vs.

STATE OF ALASKA,

Appellee.

On Appeal from the Supreme Court of the State of Alaska

MOTION TO DISMISS

ARTHUR H. PETERSON,
Assistant Attorney General,
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State of Alaska,
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GERALD W. MARKHAM,
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Counsel for Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1873

KONRAD S. URI, PER NYMARK, ARNOLD RASMUSSEN, RONALD BEIRNES, BORGE H. MANNES, CARL PEROVICH, BJORN NYMARK, SVERRE A. YRI, OLI HENDRICKS, SIGMUND ANDREASSEN, CORY A. KALDESTAD, MICHAEL LYNCH, JR., LARS MYHRE, THOMAS HAUGAN and EMIL VINBERG,
Appellants,

vs.

STATE OF ALASKA,
Appellee.

On Appeal from the Supreme Court of the State of Alaska

MOTION TO DISMISS

Pursuant to Rule 16 of the Rules of the Supreme Court, appellee, State of Alaska, respectfully moves that the appeal be dismissed on the grounds that it is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules.

STATEMENT OF THE CASE

Appellee cannot agree with the characterization of the case which the appellants have offered in hopes of demonstrating the jurisdiction of this court,[1] nor can their general statement of the case be accepted.[2]

Alaska has prohibited the taking of fish and shellfish beyond its three-mile limit since at least 1960 when during the second session of the first Alaska State Legislature it passed Chapter 121, SLA 1960, Alaska Statutes 16.10.180-220[3] authorizing the Alaska Board of Fish and Game to establish and regulate areas adjacent to state territorial waters in which migratory fish and shellfish were found. The purpose of this statute is expressed in the legislative findings which it contains.[4] The Alaska Legislature acted in recognition of the facts[5] that species of fish and shellfish found within these adjacent areas are indistinguishable from fish and shellfish within state territorial waters and migrate to and from state territorial waters, and that in order to preserve and protect the state's fishery resources within the state's territorial waters, it is necessary to regulate certain fishing beyond them.

In 1969 the Alaska Board of Fish and Game extended its regulatory efforts into the then pioneer Ber-

[1]Appellants' Jurisdictional Statement 2.

[2]Appellants' Jurisdictional Statement 14.

[3]See Appellants' Jurisdictional Statement App. F. 24-26.

[4]Alaska Statute 16.10.180.

[5]*Compare* Toomer v. Witsell, 334 U.S. 385, (1948); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, (1936); Silz v. Hesterberg, 211 U.S. 31 (1908).

ing Sea shellfish fishery. In that year it established the area described by appellants[6] and established a series of regulations setting seasons, size limits, and standards for gear. These regulations were originally challenged by a group composed of the same class, if not the same persons, as appellants, known as the North Pacific Vessel Owners Association in the United States District Court for Alaska.[7] The action was dismissed in June 1970.

In 1973 the Alaska Board of Fish and Game established a maximum quota of 23,000,000 pounds of crab for the Bering Sea area.[8] This regulation was promulgated at the urging of experts speaking on behalf of the National Marine Fisheries Service of the U.S. Department of Commerce.[9] The Bering Sea Shellfish Area quota of 23,000,000 pounds was reached on September 9, 1973, whereupon, the season was closed to crab fishing until June 25, 1974.

In December of 1973, the State of Alaska filed a seven count criminal complaint in the Alaska Superior Court alleging that Charles Bundrant had violated the fishing regulations and statutes in October 1973 by taking crab during the closed period in an area beyond three miles of St. Paul Island, Alaska, and thereafter bringing said crab within state territorial waters. *State v. Charles Bundrant,* No. 2295.

[6]Appellants' Jurisdictional Statement 14.

[7]North Pacific Vessel Owners Ass'n. v. Noerenberg, U.S. District Court for the District of Alaska, No. J-9-70.

[8]5 AAC 07.760; Appellants' Jurisdictional Statement App. F. 27.

[9]State v. Bundrant, 546 P.2d 530, 540 (Ak. 1976).

That same month, three crab fishermen, one of whom is an appellant herein, brought suit in the United States District Court in Alaska to enjoin the state from enforcing the fishing laws under which Bundrant had been charged. A three-judge district court heard the case and on April 30, 1974, entered a preliminary injunction against the state preventing the enforcement of those regulations. *Hjelle v. Brooks,* 377 F. Supp. 430 (D. Alaska 1974). The District Court did not declare that the State of Alaska was constitutionally powerless to regulate fishing for king crab in the Bering Sea beyond its three-mile limit, but only held that, upon a preliminary analysis of an incomplete record, there were grounds to suspect that Alaska's regulations infringed upon the plaintiffs' rights to due process of law and ran afoul of the implied limitation on state power emanating from the Commerce Clause of the United States Constitution. If carefully written to serve legitimate local goals, said the court, such laws might well "pass constitutional muster." *Hjelle v. Brooks, supra* at 441.

Accordingly, on June 15, 1974, the Alaska Board of Fish and Game adopted new regulations conforming with the guidelines established by the District Court in *Hjelle v. Brooks, supra.* The plaintiffs in *Hjelle* applied to the District Court for an injunction against the enforcement of these new regulations, but the Court denied their application in June, 1974. In an opinion dated June 11, 1976, following an August 1975 trial, the District Court explained that it had refused to enjoin enforcement of the new regulations because

of their apparent validity under the guidelines of the Court's earlier opinion.[10]

Under the new regulations, the commercial crab fishing season in the Bering Sea had been scheduled to open on July 1, 1974. However, prior to July 1, a private, *ad hoc* organization, constituted of the many fishermen who have taken this appeal, as well as other fishermen and processors, which called itself the "Shellfish Conservation Institute" had promulgated its own "rules" for the upcoming Bering Sea season. Those "rules" represented a wholesale defiance of the State's new regulations, with which the district court had declined the occasion to interfere, for they proclaimed that the season would open on June 26, 1974. In fact, even before that date surveillance flights detected a large number of vessels engaged in crab fishing in the Bering Sea. In response to this blatant repudiation of state sovereign authority, the Alaska Board of Fish and Game on June 25, 1974, issued an emergency regulation postponing the opening of the season and empowering the Alaska Commissioner of Fish and Game to open the season when "general order can be restored and the state can be assured that fishing will be conducted in a manner which will not jeopardize the rights of law abiding fishermen."[11]

The illegal fishing activities which prompted the criminal charges in these cases occurred between June

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[10]Opinion, n. 3, Appendix A herein.

[11]State v. Bundrant, *supra* at 534.

30, 1974, and July 24, 1974.[12] Additionally, appellant Kaldestad was charged with possession within the state of shellfish taken illegally outside the State.[13]

Meanwhile, the defendant in *State v. Bundrant,* No. 2295, had moved for dismissal of the charges against him in the Alaska Superior Court upon a stipulation of facts. That court granted Bundrant's motion to dismiss on September 10, 1974, and the State appealed.

Appellants herein also made motions in the Alaska Superior Court to dismiss their cases on numerous grounds, including (1) lack of jurisdiction, (2) unconstitutional vagueness of the regulations, and (3) illegality of the search of their crab pots.[14] Unlike defendant Bundrant, however, appellants herein did not stipulate to any facts, and these issues remain very much alive as a result.[15]

On December 17, 1974, the Superior Court dismissed the State's complaint against appellants on the sole basis that the regulations in question had intruded upon an area of exclusive federal jurisdiction established by the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331-1343, and were consequently prohibited by article VI of the Constitution of the United

[12] *Id.*, at 535.

[13] *Id.*, at 536.

[14] *Id.*, at 535.

[15] State v. Bundrant, 547 P.2d 838 (Alaska 1976) (order denying petition for rehearing).

States.[16] That ruling was also appealed to the Alaska Supreme Court by the State.[17]

Subsequently, the cases against defendant Bundrant and appellants herein were consolidated for purposes of appeal. On January 19, 1976, the Alaska Supreme Court reversed the decisions of the Alaska Superior Court and remanded the cases to that court for further consideration in conformity with its opinion.[18] On March 26, 1976, rehearing was denied by the Alaska Supreme Court. Again, the court emphasized the right of appellants herein to present for decision those defenses which had not previously been decided by the Superior Court.[19]

Appellants filed their notice of appeal to this Court on May 10, 1976. On May 26, 1976, on appellants' motion, the Alaska Supreme Court stayed the trials in these cases pending disposition of appellants' appeal to this Court.[20]

[16] State v. Bundrant, 546 P.2d at 535.

[17] Appellants' suggestion in their Jurisdictional Statement at 17, that thereafter both houses of the Alaska Legislature passed a resolution condemning the actions of appellants is totally misleading. The resolution was not so much a condemnation of appellants as it was a directive to enforce and defend the crab fishing laws to the extent constitutionally permissible.

[18] State v. Bundrant, 546 P.2d at 556.

[19] State v. Bundrant, 547 P.2d 838, 839 (Alaska 1976). On June 30, 1976, defendant Bundrant pleaded nolo contendere in the Alaska Superior Court. The plea (and conviction and fine) was subject to a condition that it be expunged (and the fine remitted) if the challenged fishing laws were struck down by this court. Thus, the only case in which there are facts of record is not before this court.

[20] Appellants' Jurisdictional Statement, App. J. Appendix A herein.

On June 11, 1976, the United States District Court filed its opinion in *Hjelle v. Brooks, supra,* dismissing the action therein.[21]

Nothing is "final" about the Alaska Supreme Court's disposition of these cases except the Court's holding that regulation of the Alaska king crab fishery is not preempted by the Outer Continental Shelf Lands Act and that some state regulation of fishing beyond the so-called three-mile limit is not forbidden *per se.*

Remaining in dispute are the issues of whether (1) whether the State's regulation of the Alaska crab fishery is an undue burden on interstate commerce (2) whether it interferes with the United State's plenary authority over the conduct of foreign commerce[22] and foreign relations,[23] and (3) whether the State of Alaska has in fact sufficient interest or "nexus" to the Alaska king crab fishery in the Bering Sea and particularly in the area in which appellants were fishing or to appellants themselves to permit the regulation of their conduct in accordance with the requirements of due process.[24] Also remaining for decision by the Superior Court are those federal and state questions to which neither the Alaska Superior or Supreme Court have spoken, the vagueness of the regulations and the alleged unreasonable search of appellants' crab pots.

[21]This opinion may be found in Appendix A herein. Plaintiffs in Hjelle v. Brooks have moved that court for reconsideration, and a ruling on that motion is imminent.

[22]United States Constitution, article I, section 8.

[23]United States Constitution, article I, section 8, article II, section 1, article VI.

[24]United States Constitution, amendment V, amendment XIV.

Resolution of these issues must necessarily await the making of an evidentiary record.

Moreover, the appellants continue to deny that they even engaged in the conduct upon which the criminal charges are based, and they may raise other affirmative defenses at the trials of these cases.

Finally, and most significantly, on April 13, 1976, the Fishery Conservation and Management Act, 16 U.S.C. §§1801-1882, became law, and the United States, for the first time, has now undertaken to conserve and manage the fishery involved herein, 16 U.S.C. §1812, effective as of March 1, 1977. 16 U.S.C. §1811, n.

ARGUMENT

THIS APPEAL IS NOT WITHIN THE JURISDICTION OF THE COURT

I.

SUMMARY OF ARGUMENT

This appeal[25] is taken pursuant to Title 28, United States Code, section 1257. Appellants' Jurisdiction Statement 1. However, the sections relied upon by appellants only provide for review of "final judgments or decrees rendered by the highest court of a state in which a decision could be had . . ." 28 U.S.C. §1257.

This court has had an opportunity to interpret the final judgment requirement of 28 U.S.C. §1257 and on several occasions has said the requirement "is not one of those technicalities to be easily scorned. It is an

[25]In the alternative appellants petition this court for a writ of certiorari pursuant to 28 U.S.C. §2103.

important factor in the smooth working of our federal system." *Radio Station WOW v. Johnson,* 326 U.S. 120, 124 (1944); *Montgomery Bldg. & Construction Trades Council v. Ledbetter Erection Co., Inc.,* 344 U.S. 178, 180 (1952). This court has recognized as the basis for its interpretation, the general consideration of good judicial administration, the mischief of economic waste and of delayed justice occasioned by review of intermediate rulings, and the added consideration of minimizing the potential conflicts between the courts of two different governments. *Radio Station WOW v. Johnson,* 326 U.S. 120, 124 (1945). Moreover, appellants have the burden of affirmatively establishing this court's jurisdiction. *Memphis v. Natural Gas Co. v. Beeter,* 315 U.S. 649 (1942).

The decision of the Alaska Supreme Court remanded the cases to the Alaska Superior Court to consider other grounds for dismissal raised by appellants. Presumably, if those motions are unsuccessful, the cases will be set for trial.[26] Traditionally, in its present posture, the decision of the Alaska Supreme Court is not a final judgment. *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62 (1948).

Since this court's decision in *Radio Station WOW v. Johnson, supra,* however, this court has accepted jurisdiction in situations in which the highest court of a state has finally determined the federal issue presented in a particular case, but in which there are further proceedings in the lower state courts to come. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 477 (1975).

[26]Appellant's Jurisdictional Statement 4, n. 1.

In *Cox Broadcasting Corp. v. Cohn, supra,* at 477-485 this court enumerated four categories of such cases in which this court has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state court, noting as it did so that:

> In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.' *Id.,* at 484.

The four categories of cases are as follows:

1. Those cases in which "the case is for all practical purposes concluded," the outcome is "preordained." That is, when there is "no defense other than his federal claim." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 479 (1975).

2. Those cases where "the federal issue, finally decided by the highest court in the State, will survive" the lower court proceedings, and the other issues to be decided below, " 'could not remotely give rise to a federal question . . . that may later come here . . . .' " *Id.,* at 480.

3. Those cases "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.,* at 481.

4. Those cases "in which the party seeking review might prevail on the merits on non-federal grounds"

and where "the state court decision might seriously erode federal policy". *Id.*, at 482-483.

II.

POSTURE OF THE CASE

As characterized by the Alaska Supreme Court, the propriety of the state's regulation of the king crab fishery beyond the three-mile limit in the area in question turned upon an analysis of two main issues.

The first issue, entitled generally "Federal Exclusivity and Federal Pre-Emption," *State v. Bundrant, supra,* at 537, dealt with a number of lesser issues resolving questions of whether Alaska's regulations were an interference with the exclusive federal domain of the regulation of interstate and foreign commerce, the management of foreign relations, or were in conflict with federal law, specifically the Outer Continental Shelf Lands Act, 43 U.S.C. §1331-1343, and certain treaties. In reaching its decision the Alaska Supreme Court was required to make certain factual determinations and assume others on the basis of a scant record and general knowledge allowing the court to determine that the state's regulations neither discriminated against nor burdened interstate commerce, nor intruded upon an area of foreign affairs. *State v. Bundrant, supra,* at 537-48.

The second issue dealt with by the Alaska Supreme Court was entitled "State Fisheries Jurisdiction," *State v. Bundrant, supra,* at 548, and dealt with the

extent or reach of Alaska's law beyond the territorial sea within the confines of due process. *State v. Bundrant, supra,* at 548-54. As viewed by the Alaska Supreme Court, the extent of the state's authority to regulate is determined by its interest or "nexus" to the fishery to be regulated. Again based upon a record which consisted of nothing more than a set of stipulations agreed to by Bundrant (who is not an appellant herein) for the purpose of deciding his motions and the state's offer to prove similar facts in the cases of *Uri, et al.,* and Kaldestad, the Alaska Supreme Court found that those facts, if proven, constituted sufficient interest or "nexus" between the State and the fishery.

It is essential to the consideration of the finality of the Alaska Supreme Court's decision to keep in mind that the case before it involved essentially two different classes of appellants. In the case of *State v. Charles Bundrant,* Alaska Supreme Court No. 2295, there existed before the court a stipulation of facts which the parties had agreed would control the legal issues before the courts. *State v. Bundrant, supra,* at 534. In that case the superior court had granted Bundrant's motion to dismiss as applied to the facts in that stipulation and accordingly all of the issues which the Alaska Supreme Court spoke to in its opinion were before it in that case. Appellants however, presented a second class of cases to the Alaska Supreme Court. Appellants did not enter into a stipulation of facts. In arguing the matter to the Alaska Superior Court, the State of Alaska was only permitted to make an offer of proof that there existed sim-

ilar facts to those agreed to in *State v. Charles Bundrant,* No. 2295. *State v. Bundrant, supra* at 535. Additionally, some evidence was before the Alaska Supreme Court in the form of judicially noticeable facts and portions of unsigned depositions which the appellants had attached to their motion to dismiss. *State v. Bundrant,* 547 P.2d 838 (Alaska, 1976) (on rehearing). Appellants' arguments included the same federal constitutional issues raised by *State v. Charles Bundrant,* No. 2295, requiring determinations of fact; i.e., the burden upon interstate and foreign commerce, the intrusion upon foreign affairs, and the lack of a nexus between the State and the fishery resulting in violations of appellants' due process rights. Unlike the Alaska Superior Court in *State v. Charles Bundrant,* No. 2295, however, the Alaska Superior Court here ruled upon only one of appellants' arguments, specifically that the regulations under which they were charged intruded upon, and were in conflict with an area of exclusive federal jurisdiction established by the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331-1343, and were consequently prohibited by article VI of the Constitution of the United States. Nor did the Alaska Superior Court make factual findings necessary to finally resolve the other issues raised by appellants. Accordingly, though the Alaska Supreme Court ruled upon numerous federal issues raised by appellants, its rulings as applied to the *facts* dealt only with facts established in *State v. Charles Bundrant,* No. 2295. As to appellants, the court's decision except as to the legal issue of whether the state regulations conflict with the Outer Continental Shelf

Lands Act, and possibly the further legal conclusion that some state regulation of fishing beyond the state's three-mile limit is not forbidden *per se,* is based on no more than the state's offer of proof which the appellants maintain they strongly contest. To demonstrate the degree to which the appellants contest the state's offer of proof in this matter, this court need only review appellants' petition for rehearing filed to the Alaska Supreme Court (R. 387-89). There appellants claimed that this court's opinion was based upon "material factual assumptions" which "are strongly disputed" by all of the appellants. (R. 387).

On rehearing, the Alaska Supreme Court clarified further its already clear pronouncement in its first opinion[27] and stated:

> In any event, appellees have not been precluded from raising specific defenses based on matters not previously determined by the trial courts. *State v. Bundrant,* 547 P.2d 838, 839.

Accordingly, many issues raised and answered by the Alaska Supreme Court in the opinion as to *State v. Charles Bundrant,* No. 2295 below, remain to be answered as to appellants only after a hearing of the facts by the Alaska Superior Court below.

Also remaining for decision by the Alaska Superior Court are those questions to which neither it nor the Alaska Supreme Court have spoken, the vagueness of

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[27]"By virtue of our decision herein, we do not pass on other legal arguments advanced by appellees. The decision of the trial court was based on the doctrine of federal pre-emption and did not consider other grounds for dismissal. Clearly these arguments may be renewed in the trial court." State v. Bundrant, 546 P.2d 530, 556 n. 108.

the regulation and the alleged unreasonable search of appellants' crab pots.[28]

III

THE DECISION OF THE ALASKA SUPREME COURT IS NOT A FINAL JUDGMENT

As this court noted at the outset of its opinion in *Cox Broadcasting Corp. v. Cohn, supra,* at 477-478, in most if not all of those interlocutory state court decisions of which it accepted jurisdiction, the further state court proceedings would not require the decision of other federal questions that might also require review by this court at a later date.

Appellants cite only one case which they claim supports their position that an interlocutory decision which leaves open further state court decisions on other federal questions, may be a final judgment.[29] *Hudson Distributors v. Lilly,* 377 U.S. 386 (1964). *Hudson* is, of course, the one case which could have prompted the "in most if not all" language in *Cox Broadcasting Corp. v. Cohn, supra.* As Mr. Justice Harlan pointed out in dissent in *Hudson Distributors v. Lilly, supra* at 500-01, this court gave no explanation at all in that case for its departure from its established principles. Mr. Justice Harlan suggested that the reason for this departure was due to the fact

[28]Appellants themselves recognize that the federal issue of the vagueness of the regulations remains open for consideration. Appellants' Jurisdictional Statement 7, n. 6.

[29]Appellants' Jurisdictional Statement 7, n.6.

that the jurisdictional question was not called to the court's attention by a motion to dismiss raising the issue. Mr. Justice Harlan also pointed out that the exceptions (the four categories in *Cox)* all involved intermediate rulings having "serious public consequences". *Id.,* at 397. *Hudson,* like the instant case, does not meet that test.

Clearly even if this court has on one occasion accepted jurisdiction over a decision which leaves open for decision other federal questions, it will not do so "in most" cases. *Cox Broadcasting Corp. v. Cohn, supra* at 477-78.

Appellants claim[30] that this case comes within both the third and fourth categories of cases described in *Cox Broadcasting* in which this court has determined that a judgment is final though something further remains to be litigated.[31]

This court described the third category in *Cox Broadcasting* as consisting of those cases "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* This cate-

[30]Appellants' Jurisdiction Statement 8-9.

[31]Clearly this case does not come within the first category set forth in Cox Broadcasting Corp. It does not involve a case in which there are further proceedings yet to occur in state court but on which the federal issue is conclusive or the outcome pre-ordained. 420 U.S. 479. The federal issue decided by the Alaska Supreme Court is not conclusive on the outcome of this litigation and the outcome of the proceedings below are certainly not pre-ordained.

Similarly, this case does not come within the second category of cases in Cox Broadcasting Corp. There simply can be no question but that there are other federal issues to be decided below which may later come here.

gory consists of cases in which there are no other federal issues and the highest state court has finally decided the single federal issue. *See North Dakota Pharmacy Bd. v. Snyder's Store,* 414 U.S. 156, 163 (1973). But where, as here, there are a abundance of other federal issues, and where, as here, the State may appeal from an adverse ruling on those issues, *State v. Browder,* 486 P.2d 925 (Alaska 1971), the rule from those cases simply does not apply. At any event, if the appellants do prevail on the other federal issues (and the State takes no appeal), the State must either abandon the fishing laws in issue (thereby rendering the Alaska Supreme Court's ruling on preemption—the issue on appeal here—nugatory and of no actual force or effect) or enforce them in another mode, which would then result in the federal issue being brought here. In plain fact, either the State must abandon its laws (in which case, there will be no federal issue) or most certainly "later review of the federal issue" will be had.

Nor does this case come within the fourth category of exceptions described in *Cox Broadcasting.* That category consists of those cases (1) where the party seeking review might prevail on the merits below, (2) where the reversal of the State court's ruling on the federal issue would preclude further litigation on the cause, *and* (3) where "a refusal immediately to review the state court decision might seriously erode federal policy . . . ." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 482-483. First, the cases in this category are those in which there is only a single federal issue. Second, they involve state court decisions which will seriously erode (or interfere with) established federal policy. While much has been said to the effect that the decision below and the fishing laws in issue do just that, in plain fact they do not.

In *State v. Bundrant,* 546 P.2d 530, 558-559 (Alaska 1976), Mr. Justice Rabinowitz (concurring) said:

> In summary, therefore, the landing law cases emanating from *Silz v. Hesterberg,* 211 U.S. 31 (1908), authorize the State's prosecution of appellees Bundrant and Kaldestad under count IV. The prosecution of appellee Vinberg is unquestionably authorized by *Skiriotes v. Florida, supra.* Under the broader principle governing the extraterritorial application of criminal laws, manifested in part in *Skiriotes,* the remaining appellees in *Uri et al.* and appellee Kaldestad may also be prosecuted for their conduct. Justice Erwin and I break new ground, if at all, only in expressly recognizing that broader principle.

Because this holding and the holding that Alaska's regulation of the fishery was "entirely compatible with the federal constitution and existing federal legislation" *(id.,* at 556) were the only holdings in which a majority concurred, they constitute the law of the case. It is difficult to see how such a decision might "seriously erode" federal policy.

The decision does not chill a free press, misapply the Equal Protection Clause, interfere with federal regulation of labor relations, misapply federal trade laws, interfere with federal regulation of communications, or otherwise erode federal policy. It simply ap-

plies well established federal doctrines to what until now has been a void in the conservation of important fishery resources. The decision (and Alaska's regulation) eschews any control whatsoever over foreign nationals. No claim is laid to any resource claimed by the United States. All that is done is to protect a vital resource (and dependent economy) by reasonable regulation of Alaskan fishermen and fishermen from neighboring States. There is no hint of discrimination against nonresidents.

If the exceptions analyzed in *Cox Broadcasting* have a common factor it is precisely that the decisions being reviewed posed "serious public consequences" or "seriously erode federal policy." The decision in the instant case does neither, nor can it do so in future. Congress has filled the void by adopting the Fishery Conservation and Management Act. 16 U.S.C. §§1801-1882. Alaska's stop-gap efforts to protect an important fishery resource will expire in the immediate future, to be replaced by a federal-state cooperative program. 16 U.S.C. §1852(7).

While appellants suggest that the contested regulations go beyond the 200-mile limit adopted by this Act, and therefore, beyond its coverage, Jurisdictional Statement 8, there is nothing of record to indicate that Alaska has enforced or will enforce them beyond that limit. In any event, interlocking circles with diameters of 200 miles may be drawn about Alaska's coast and offshore islands so as to cover the entire eastern Bering Sea, i.e., that portion of the sea open to American fishing and closed to Russian fishing.

Jurisdictional Statement, App. F. 19. (U.S. Soviet Treaty on Fishing for Crab). Accordingly, there is no reason to assume that Alaska's regulations exceed the coverage of the new Act or speculate that they might be applied to do so. And as we will show, the Act itself provides a mechanism for preventing any State from acting contrary to federal policy.

In the meantime, it can hardly be suggested that the State's regulation or the decision below will erode the federal policy announced in the new Act. The Act does not preclude extraterritorial regulation of fishing by vessels which are registered in Alaska. 16 U.S.C. §1856 (a). Bundrant's vessel was registered in Alaska. *State v. Bundrant,* 546 P.2d 530, 534-535 (Alaska 1976). There are no facts of record concerning appellant's vessels, but it may be assumed that they, like Bundrant, followed the law requiring that commercial fishing vessels be licensed to fish or land fish in Alaska. They were not charged with its violation. *Id.*

The pertinent law, Alaska Statute 16.05.490(a), reads:

> *Vessel license.* (a) As a condition to delivery or landing of fish or engaging in commercial fishing in the State, a license is required for a commercial vessel, including a vessel used in charter service for the recreational taking of fish and shellfish.

In sum, the decision is in no significant way hostile to any federal policy, and it is entirely consistent with announced federal policy. That being so, the rule from *Cox Broadcasting* simply does not apply.

Appellants appear to urge this court to adopt yet another category or at least a subcategory not enumerated in *Cox Broadcasting,* that is, if the United States files an amicus brief before a state supreme court in a controversy that may have an incidental effect on some United States policy and the state court fails to adopt every point in the United States' position[32] or if a three judge panel of the United States District Court has preliminarily enjoined different state regulations involving the same general issue,[33] then this court should take jurisdiction even though the litigation is still in its preliminary stages. The argument is not supported by authority or reason.

Nor is appellants' argument bolstered by the fact that in reaching its decision the Alaska Supreme Court agreed with the ruling but not completely with the legislative analysis[34] of one United States Court of Appeals ruling. *United States v. Ray,* 423 F.2d 16 (5th Cir. 1970). The decision in issue certainly does not contradict the holding in *Ray* that the United States has the exclusive right to explore and exploit coral reefs as part of the outer-continental shelf. In reality no federal-state conflict exists in this case.

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[32]Here of course the United States' main concern in its amicus brief was in assuring that Alaska's regulations not be applied to foreign nationals, a point resolved at the outset by the State of Alaska's acceptance of it. State v. Bundrant, supra at 540; Hjelle v. Brooks, *supra* at 438.

[33]See State v. Bundrant, *supra* at 547.

[34]Contrary to appellants' assertions, Appellants' Jurisdictional Statement 10, the Alaska Supreme Court did not refuse to follow the reasoning of the United States District Court at the pages cited by appellant. It simply disagreed with that court on the meaning of state laws since repealed and not part of this case.

If this court were to consider noting probable jurisdiction in this case, it would likely conclude that it would be the least appropriate case in which to expand those categories of final judgments enumerated in *Cox Broadcasting Corp. v. Cohn, supra.*[35]

Of foremost concern in this court's consideration should be the undesirability of interfering with a good faith state criminal prosecution at this incipient stage of the litigation. Aside from the general principles of federalism and comity which apply to all civil proceedings, a federal court's decision to intervene in a good faith state criminal prosecution strikes at the very heart of our federal system. *Compare, Younger v. Harris,* 401 U.S. 37 (1971); *Samuels v. Mackell,* 401 U.S. 66 (1971); *Steffel v. Thompson,* 415 U.S. 452 (1974). Of all of the cases in which this court has accepted review of interlocutory appellate orders, appellee is aware of only two which involved criminal proceedings, *Mills v. Alabama,* 384 U.S. 214 (1966) and

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[35]Appellants' reliance upon this court's notation of probable jurisdiction in Douglas v. Sea Coast Products, Inc., No. 75-1255 ..... U.S. ....., 96 S.Ct. 1723 (1976) is misplaced. An analysis of the issues in Douglas v. Sea Coast Products, Inc., reveals that the challenged state statute there allegedly discriminates against fishing by resident aliens in direct contradiction to this court's decision in Takahashi v. Fish Commission, 334 U.S. 410 (1948).

On the other hand, the Alaska court has said of the laws with which these appellants are charged:

> Moreover, there is absolutely nothing to suggest that these regulations are either by their terms or in their enforcement, discriminatory against non-Alaskans. State v. Bundrant, *supra* at 540.

More importantly appellants completely disregard the fact that this court noted jurisdiction in Douglas v. Sea Coast Products, Inc., pursuant to 28 U.S.C. §1253 which provides for a direct appeal to this court from a decision of a three judge United States District Court enjoining the enforcement of a state statute.

Harris v. Washington, 404 U.S. 55 (1971). In *Mills,* it was conceded that nothing remained to be tried below, and in *Harris,* it was the trial itself that violated the United States Constitution. Moreover, here, a three judge panel of the United States District Court has reviewed the state's laws and the prosecutions thereunder, and while granting a preliminary injunction against the laws as they were originally worded, has refused to grant preliminary relief to the laws as rewritten. And after an extensive analysis of the matter, including a complete evidentiary hearing, that court declined to interfere with the enforcement of these state laws, evidently holding the view that the State of Alaska had apparently complied with the court's suggestion as to how the state might accomplish its regulatory objectives.[36] Circuit Judge Wright's concurring opinion indicates that the state's actions are in all manner proper and in good faith. It can hardly be argued in the face of Judge Wright's conclusion that the state has not made a conscientious effort to tailor its regulations to the language of that court's prior opinion.

Moreover, intervention by this court at this stage of this litigation could seriously hamper the outcome of these state court criminal trials. Over two years have passed since the state filed its charges in these matters while appellants' motions were ruled on by the Alaska Superior Court and appealed to the Alaska Supreme Court. During the further passage of time that this court may require in resolving the legal is-

[36]Appendix A herein.

sues now raised, the State of Alaska's ability to prove that the appellants even committed the acts with which they are charged could be seriously jeopardized.[37]

As this court noted in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 486 n. 13, in response to Mr. Justice Rehnquist's dissent, in determining whether a decision comes within the fourth category of final judgments enumerated in that opinion, this court will make a limited consideration of the merits of the case to determine whether an issue is substantial and the state court's decision is incorrect. This limited consideration presumably is similar to the consideration a United States District Court makes in determining whether to grant a preliminary injunction. *See Sierra Club v. Hickel,* 433 F.2d 24 (9th Cir. 1970), *aff'd.* 405 U.S. 727 (1972). The only issue before this court at this stage of the litigation is appellants' supremacy clause argument. In making a determination as to whether to grant a preliminary injunction on this very issue the three judge panel of the United States District Court for Alaska held:

> At this incipient stage of the litigation the Court does not conclude that plaintiffs are 'reasonably certain' to succeed ultimately on the basis of their supremacy clause argument. *Hjelle v. Brooks, supra,* at 438.

Furthermore, when the matter was finally briefed and after a trial on the merits in United States District Court, that same three judge panel held that Alaska's

[37]Trials in these matters have been stayed by the Alaska Supreme Court pending appeal to this Court. Appellants' Jurisdictional Statement, Appendix J.

new regulations seemed to be in compliance with the directions of their earlier opinion and that court was content to abstain from reviewing the challenged regulations which were before them on *all* federal issues which are to be litigated in this case.

Of course appellee does not urge this court that it is bound by a decision of a three judge panel of the United States District Court in deciding whether this court should assume jurisdiction. Nonetheless the district court did make a similar decision on not one but two occasions, the latest occasion occurring after extensive briefing and a trial on the merits and after the decision of the Alaska Supreme Court in *State v. Bundrant, supra.* Moreover, this decision by the United States District Court is one which it is most competent to make. Under these circumstances, this court should give great weight to the district court's determinations and refuse to note probable jurisdiction.

IV

THE ISSUES PRESENTED ARE NOT SO SUBSTANTIAL AS TO WARRANT A DEPARTURE FROM THE PRACTICE OF ONLY REVIEWING CASES UPON FINAL JUDGMENT.

If this court ever reaches the issue, and undertakes a limited review of the merits of this appeal in order to determine whether the issues here are substantial enough to place it within the fourth category of cases enumerated in *Cox Broadcasting Corp. v. Cohn,* it will conclude that the issues involved here do not justify this court in deviating from its practice of only reviewing final judgments.

In reviewing this court's language in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 487, n.13, it seems clear that the test of whether the issues presented meet the requirements of that exception are at least as difficult as meeting the considerations of a petition for certiorari.[38] Accordingly, and to avoid repetition, this part of appellee's argument is also made in opposition to appellants' request that if this court holds that it does not have jurisdiction pursuant to 28 U.S.C. §1257(2), it treat appellants' jurisdiction statement as a petition for a writ of certiorari under 28 U.S.C. §2103.

This court has affirmed that certiorari will issue, in the exercise of its discretion, only in cases of gravity and general importance and in order to secure uniformity of decision. *Magnum Import Co. v. Coty,* 262 U.S. 159 (1922); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251 (1915). As has previously been stated, the cases heretofore excepted under the fourth category in *Cox Broadcasting* have involved the authority of the tribunal to try a case or a first amendment violation.

With the foregoing propositions in mind the appellee shall, within the confines of a limited consideration of the merits, address appellants' legal arguments and demonstrate that they are insubstantial.

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[38] Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court. U.S. Sup. Ct. Rule 19, 28 U.S.C.

A. A state has power to regulate the conduct of United States nationals in a fishery occurring partially beyond its territorial limit in order to protect its interests in that fishery within its territorial limit.

The application of state law to the conduct of its fishermen beyond the state's territorial boundary in the absence of conflicting federal law is well settled. *Skiriotes v. Florida,* 313 U.S. 69 (1941); *Felton v. Hodges,* 374 F.2d 337 (5th Cir. 1967) *cert. denied,* 389 U.S. 971 (1967). *Skiriotes* was the first case to recognize this principle and the wisdom of that case has never been questioned. Appellants contend that, "*Skiriotes* has probably proven unwieldly in application to modern international fisheries and it can reasonably be predicated that it will be overruled." Appellants' Jurisdictional Statement 22. Appellants then go on to state that it may be unnecessary to overrule *Skiriotes* to reverse the Alaska Supreme Court below. However, appellants' point is irrelevant. If *Skiriotes* has become "unwieldly," the solution has already been provided by Congress in enacting the Fisheries Conservation and Management Act. In addition to the new Act and *Skiriotes* there is also *Toomer v. Witsell, supra. Toomer* followed this court's decision in *United States v. California,* 332 U.S. 19 (1947), and expressly reaffirmed the power of the states to regulate fishing despite the paramount powers of the United States in the marginal sea, in the absence of conflicting federal legislation. The Outer Continental Shelf Lands Act creates no greater bar to reasonable and nondiscriminatory state regulation of American fishermen in the waters over the shelf than did *United States v. California, supra.* The paramount rights with respect to fishing are the same there as they are in the marginal sea. And this principle underlies the recent decision by the United States Court of Appeals for the Fifth Circuit.[39] That court clearly could not have perceived the Outer Continental Shelf Lands Act as overruling *Skiriotes.*

Appellants' argument based upon the "tidelands cases," *United States v. California,* 332 U.S. 19 (1947); *United States v. Louisiana,* 339 U.S. 699 (1950); *United States v. Texas,* 339 U.S. 707 (1950), cannot survive this court's distinguishing in *Toomer* and *California* between the power of the state to regulate fishing, absent conflicting federal legislation, and the United States' "paramount rights" in and to the seabed or the waters.

Toomer involved nonresidents. *Skiriotes* and *Felton* involved residents. In adopting the Fisheries Conservation and Management Act, Congress made that distinction irrelevant, relying instead, and quite pragmatically, on the locus of vessel registration. 16 U.S.C. §1856. Bundrant (concerning whom there are facts of record) had registered his vessel in Alaska. *State v. Bundrant,* 546 P.2d 530, 534-535 (Alaska 1976). The appellants (concerning whom there are no facts of record) may be presumed to have done so in accordance with the requirements of Alaska Statutes 16.05.490 as they were not charged with the violation.

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[39]Felton v. Hodges, 374 F.2d 337 (5th Cir. 1967) *cert. denied,* 389 U.S. 971 (1962).

Id. Accordingly, in extending Skiriotes and Felton, if at all, the Alaska Supreme Court in these cases has done nothing more than Congress has done. Since the cases do not present a concrete factual situation involving the application of the regulations to those whose vessels are not registered in Alaska, it would be inappropriate for this court to consider it in the abstract. *Cf. Toomer v. Witsell, supra,* at 394.

For appellants to argue that Congress has not resolved the question is plainly incorrect. Even if the phrase "registered under the laws of such State" in 16 U.S.C. §1856(a) were ambiguous, Congress, in the very next subsection has cured the effect of any ambiguity. This is because 16 U.S.C. §1856(a) and (b) together read:

> (a) In general.—Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.
>
> (b) Exception.—(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, that——
>
> (A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the fishery conservation zone and beyond such zone; and
>
> (B) any State has taken any action, or omitted to take any action, the results of which

> will substantially and adversely affect the carrying out of such fishery management plan;
>
> the Secretary shall promptly notify such State and the appropriate Counsel of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.
>
> (2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

Appellants are first to assert that the fishery involved in this case is predominately within the fishery conservation zone and beyond such zone, i.e., beyond the marginal sea. Jurisdictional Statement, at 16-17. That being so, if Alaska were to regulate the fishery adversely to the United States, the Secretary may oust Alaska altogether. It would be far better for the Secretary to make the determination of whether the vessels are subject to Alaska's regulations in the first instance than for this court to consider the issue in the abstract. At any event, and upon a proper record and following some administrative experience with the Act, this court will undoubtedly have an opportunity to examine its proper interpretation.

Appellants also recognize that adopting their arguments would cast serious doubt upon the validity of

another solid line of cases[40] upholding state "landing laws" which prohibit the possession of fish within state waters taken in violation of law beyond state waters. Appellants' Jurisdictional Statement 23. Considering the local and temporary nature of the regulations and of the decision below, there hardly seems grounds for doing so.

Finally, appellants' argument that this matter is one of "conflict" among lower state and federal courts is not correct. The Alaska Supreme Court was itself following a decision of the United States District Court[41] in reaching its decision. Numerous other lower state and federal court decisions are in accord with its holding. *Felton v. Hodges, supra; People v. Foretich,* 14 Cal. App. 3d Supp. 6, 92 Cal. Rptr. 481 (Cal. App. 1970); *Gherra v. California, Fish & Game Department,*[42] No. 47823 SAW (N.D. Cal. 1973); *Frach v. Schoetler,* 46 Wash. 2d 281, 280 P.2d 1038 (1955); *Johnson v. Gentry,* 220 Cal. 231, 30 P.2d 400 (1934); *Santa Cruz Oil Corp. v. Milnor,* 55 Cal. App. 2d 56, 130 P.2d 256 (1942).

B. Federal law does not preempt Alaska's power to regulate the Bering Sea King Crab Fishery.

Appellants' second argument simply consists of asserting that the provisions of the Outer Continental Shelf Lands Act 43 U.S.C. §1331-1343 establish not only the seabed but also fishing for the crab thereon

[40]Silz v. Hesterberg, 211 U.S. 31 (1908); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1937).

[41]United States v. Thompson, (No. A-87-72 Cr., Dec. 15, 1972) unpublished opinion, see Record File 4.

[42]Unpublished opinion, see Record File 4.

lying beyond the state's territorial limits as an area and subject of exclusive federal regulation. Appellants' Jurisdictional Statement 23-27. Appellants however, cite no decision by this court or by any court in support of their argument.

On the other hand, the Outer Continental Shelf Lands Act distinctly provides:

> This subchapter shall be construed in such manner that the character as high seas of the waters *above* the outer continental shelf and the right to navigation and fishing therein shall not be affected.[43]

Admittedly there has never been a decision by this court speaking to precisely this issue, but simply because appellants have raised an argument never decided by this, or any court does not make it substantial. In *Guess v. Read,* 368 U.S. 957 (1961), this court refused to grant certiorari to a decision by a United States Court of Appeals[44] holding the clear meaning of this language to be that the exclusive provisions of the Outer Continental Shelf Lands Act do not apply to the waters above the shelf.

The legislative history behind the meaning of this passage is voluminous and was substantially briefed by both sides below.[45] Adequate support exists for the state's position that the exclusive federal regulatory provisions of the Outer Continental Shelf did not

[43]43 U.S.C. §1332(b). (emphasis added)

[44]Guess v. Read, 290 F.2d 622 (5th Cir. 1961). See also Hjelle v. Brooks, *supra,* at 430.

[45]Record File 4.

appertain to the regulation of fishing by citizens of the United States.[46]

The United States did acquire title or paramount rights with respect to foreign nationals to Alaska king crab as a sedentary species of the continental shelf pursuant to article II, section 4, of the 1958 Geneva Convention on the Continental Shelf[47]; however, the United States did not thereafter undertake to regulate this resource or to declare it to be within the exclusive domain of the federal government. This state of law continued until very recently when this absence of federal regulation, in part, prompted the passage of the Fishery Conservation and Management Act early this year.[48]

United States v. Ray, 423 F.2d 16 (5th Cir. 1970), relied upon by the appellants is not at all in conflict with the Alaska Supreme Court decision as that case involved a trespass and a claim against the title asserted by the United States and did not reach the question of whether state domestic law could be applied by a state to a United States citizen's fishing in the waters over the seabed. At any event, the rule from *Ray* is that no one may exploit the shelf's resources without the express consent of the United

[46]Sen. Re. No. 411, 83rd Cong., 1st Sess. (1953). See also remarks of Senator Douglas 99 Cong. Rec. at 2868 (1953);

> We are not particularly interested in kelp or shrimp or oysters, those are sideshows. The question is to oil and gas.

See also a discussion of this very provision of 43 U.S.C. §1332(b) by Senator Cordon (the bill's manager) expressly supporting the state's position. Hearings before the Comm. on Int. and Ins. Affairs, Senate, 83rd Cong., 1st Sess. on S. 1901, Outer Continental Shelf (1953) at 405-07.

[47]15 U.S.T. 473, TIAS 5578 (1953).

[48]16 U.S.C. §1801 et seq. (1976).

States. Under *Ray,* appellants are confessed trespassers against the United States.

If appellants have a valid legal argument on this sole ground, a brief analysis of the Outer Continental Shelf Lands Act legislative history will reveal that it is an argument which is bound up in international law and the rationale of the "tidelands" cases. Insofar as the activities of fishermen are concerned, it is the Fisheries Conservation and Management Act and not the Outer Continental Shelf Lands Act which expresses the policy of the United States. The Alaskan king crab is squarely with the coverage of the new Act. 16 U.S.C. §1802(4). Appellants are arguing on an "issue" which, pragmatically, has ceased to exist. Under this court's pragmatic approach to jurisdiction, little reason exists to consider the issue.

Finally, the decision below has no national impact whatsoever. Whatever impact the decision may have had has already been superseded by an Act of Congress. A whole new federal regimen for regulation of this and other off-shore fisheries has been established and is in the process of implementation. It is that new program, and not the challenged decision, which will have a national impact.

CONCLUSION

This court has jurisdiction to hear and decide questions raised on a final judgment from the highest state court from which review may be obtained. This court has not applied to final judgment rule in a

purely mechanical fashion but has established a number of categories of cases wherein it will review the decisions of the state courts which are not technically final. In most, if not all of these cases however, the additional proceedings will not require the resolution of other federal questions that might also require review by this court at a later date.

Appellants' case presents numerous federal and state issues which if disposed of would avoid the necessity of this court's review of the issue before it. Appellants' case also presents numerous federal issues which might also require this court to take review at a later date. Moreover even if this appeal did not have infirmities, it cannot be considered a final judgment because it does not fall within any of the categories of cases in which this court will review an interlocutory state court decision.

The Alaska Supreme Court's decision does not present issues of conflict among lower federal courts and it especially does not conflict with the opinion of the United States District Court for Alaska which has reviewed the regulations and the decision in issue. Likewise any concern of the United States should have been alleviated by Alaska's acknowledgement that the state law does not apply to the activities of foreign fishermen. The issue that appellants raise that has not been firmly decided by this court (exclusive jurisdiction under OCSLA) is one which has, in all effect, been resolved as to future controversies by the recent passage of the Fishery Conservation and Management Act.

Appellants have tried to inflate a controversy which, prior to the enactment of the Fishery Conservation and Management Act, had the potential for becoming a matter of some national importance. However, that importance has since passed. If appellants have justifiable legal claims they should and shall have the opportunity to present those claims to this court at the proper time, when there has been a final judgment that disposes of all of their state and federal claims. At that time this court will be able to determine their rights, if any, in this matter.

This appeal should be dismissed on the grounds that it is not within the jurisdiction of this court and it should not be considered in the alternative as a petition for certiorari.

Dated, August 9, 1976.

Respectfully submitted,

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(Appendix A Follows)

APPENDIX A

Appendix A

In the United States District Court
for the District of Alaska

Civil Action No. A-191-73

Severin Hjelle, et al., Plaintiffs,

vs.

James W. Brooks, et al., Defendants.

[Filed June 11, 1976]

OPINION

Before: WRIGHT, Circuit Judge, and VON DER HEYDT and PLUMMER, District Judges

PLUMMER, Senior District Judge:

Plaintiffs, a group of commercial king crab fishermen, seek injunctive and declaratory relief to prevent enforcement against them by the State of Alaska of State fishing regulations in the Bering Sea outside of three miles from Alaska's coastline.[1] The regulations in effect at the time this suit was commenced[2] were

[1]The regulations are 5 AAC 34.005, 34.020, 34.030, 34.035, 34.040, 34.050, 34.060, 34.070, 34.085, 34.090, 34.095, 34.096, 34.097, 34.900, 34.910, 34.915, and 34.920(a). Plaintiffs also seek a declaration of invalidity of A.S. 16.10.190, 16.10.200 and 16.10.210 insofar as said statutes purport to authorize the regulation of plaintiffs fishing for king crab in the Bering Sea.

[2]5 AAC 07.760 and 36.040.

repealed after we issued our prior opinion enjoining their enforcement. *Hjelle v. Brooks,* 377 F.Supp. 430 (D.Ak. 1974). After repealing the old regulations, the State adopted emergency interim regulations on May 9, 1974, and then the current regulations on June 15, 1974. We refused to enjoin the emergency regulations because of their possible validity under a rationale we suggested in *Hjelle.*[3] Thereafter, on July 15, 1974, the State filed criminal charges against seven crab fishermen who are plaintiffs in this federal action for violation of the new regulations. The third amended complaint, challenging the regulations cited in note 1, was filed July 31, 1974, fifteen days after the criminal charges were filed. Since then, the state and the federal actions have proceeded independently until we granted a stay of our proceedings at the parties' request pending the decision of the Alaska Supreme Court in the state proceeding.[4]

On January 19, 1976 the Supreme Court of Alaska issued its opinion in *State v. Bundrant,* 546 P.2d 530 (Ak. 1976). The petition for rehearing was denied March 26, 1976, 547 P.2d 838. In *Bundrant* the Alaska Supreme Court reversed the state trial court's dismissal of the criminal charges brought against seven

[3]At 377 F.Supp. 441 we stated (emphasis in original):
"[Alaska's] regulation of certain extraterritorial conduct would pass constitutional muster if its regulations were directed at conserving the crab fishery *within* Alaska's waters by regulating crabbing in that area and, *in order to facilitate enforcement,* by prohibiting the possession of crab in the state during the closed season, even if that crab were caught outside the state."

[4]Defendants' closing argument, page 8, filed September 26, 1975; plaintiffs' reply argument, page 6, filed October 9, 1975.

crab fishermen. The decision upholds the constitutionality of the regulations under which the fishermen were charged, and which are in issue here.

The question now presented is whether this court should make a second determination of the constitutional validity of the State's Bering Sea king crab regulations. For the reasons that follow, we think that this court should not do so. Accordingly, we dismiss as to all plaintiffs and all claims. We rely chiefly on rationales developed in cases relating to abstention.

Abstention by a federal court when there is a pending state criminal prosecution is governed by *Younger v. Harris,* 401 U.S. 37 (1971), and subsequent Supreme Court cases. *Younger* provides that equitable relief in federal court is not available to interfere with a pending state criminal proceeding absent bad faith harassment by the state officials. In our case, only seven of the federal plaintiffs are involved in pending state criminal proceedings. Normally, each federal plaintiff is treated individually for purposes of abstention. *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 928 (1975); *Steffel v. Thompson,* 415 U.S. 452, 471 note 19, (1974). Accordingly, absent other factors, the criminal proceedings against the seven state defendants should not be imputed to the other thirty-seven federal plaintiffs. However, when there is sufficient "joint activity and common interest" abstention may be justified even as to those federal plaintiffs who are not state defendants. *Allee v. Medrano,* 416 U.S. 802, 832 n.8, 831-832 (1974) (Burger, C.J. concurring).

Hicks v. Miranda, 422 U.S. 332, 348-349 (1975); *Sole v. Grand Jurors For the Counties of Possaic and Bergen,* 393 F.Supp. 1322, 1329 n.12 (D.N.J. 1975). In this case, there is such joint activity and common interest.

To lightly impute state prosecution to a federal plaintiff not a party thereto would obviously frustrate the policies announced in *Steffel, supra,* and *Dombroski v. Pfister,* 380 U.S. 479 (1965). Yet in this case the pleadings and testimony of plaintiffs so clearly demonstrate the "joint activity and common interest" of all plaintiffs that we believe imputation is proper.

Severin Hjelle, by affidavit filed June 17, 1974, stated that:

> "[t]his action was originally commenced . . . on behalf of the members of the North Pacific Vessel Owners Association [NPVOA]."

By supplemental memorandum filed June 21, 1974, plaintiffs indicated that they had

> "now included as parties all non-resident members of the [NPVOA] who are prepared to commence fishing in the Bering Sea on June 26, 1974."

Hjelle's affidavit also indicated that he was President of the NPVOA as of June 17, 1974. Apparently Hjelle's incumbency expired sometime thereafter, for at trial Konrad Uri, a federal plaintiff and state defendant, testified that he was President of the NPVOA.

In an affidavit of May 23, 1974, Hjelle stated:

> "To avoid a complete lack of management for the Bering Sea king crab fishery, the individual members of the [NPVOA], now comprising some 42 vessel operators and the seven processors who purchase the vast majority of king crab caught in the Bering Sea have formed an organization called the Shellfish Conservation Institute. The institute has adopted regulations . . . which honor the treaty restrictions on the capture of king crab and, in addition, [has] proposed to commence the king crab fishing season in the Bering Sea on June 26, 1974."

Hjelle's June 17 affidavit explained how individual fishermen looked to the Shellfish Conservation Institute for guidance in pursuing their work:

> "All plaintiffs in this case stand ready to commence fishing in the Bering Sea on or before June 26, 1974, *as specified in the industry regulation* of the Shellfish Conservation Institute and will suffer irreparable harm if not permitted to do so." (Emphasis added)

In a telegram attached as an exhibit to plaintiffs' third amended complaint, the Alaska Fish and Game Commissioner recognized as a "flagrant challenge of authority":

> "the announcement by the Shellfish Conservation Institute that it had adopted king crab fishing regulations on the basis that it did not recognize the regulations and jurisdiction of the State of Alaska . . . ."

The most recent indication of the joint nature of the state and federal proceedings is the agreement by

all federal plaintiffs, including those not under state indictment, to a stay of the federal proceedings pending the decision of the Alaska Supreme Court.

While the numerous federal plaintiffs own their vessels and gear individually rather than collectively, it is clear to us that they are all so closely related in terms of "control and management" (*Doran,* 442 U.S. at 928), that application of the "imputation" principle is proper.[5] The participation of Konrad Uri,

[5]We perceive the facts before us as placing this case somewhere between *Steffel* and *Allee.*

In *Steffel,* the federal plaintiff was not a state defendant, although his handbilling companion was. It was precisely this relationship which enabled Steffel to overcome the case or controversy requirement. 415 U.S. at 458-60. According to Chief Justice Burger, concurring in *Allee:*

> "There was no indication in [*Steffel*] that the petitioner and the arrestee were associated otherwise than in the distribution of antiwar handbills. Furthermore, in *Steffel,* the petitioner departed to avoid arrest while his companion in handbilling stayed. The joint activity of petitioner and his companion in *Steffel* ceased prior to the arrest of the companion. Finally, there is no indication that the arrestee would seek to or be able to vindicate petitioner's rights in the criminal proceeding. . . ."

416 U.S. at 831 (Burger, C.J., concurring.).

In *Allee, all* individual federal plaintiffs were subject to state prosecution. 416 U.S. at 821-26, 830-32 (Burger, C.J., concurring). Thus the Chief Justice noted that the union with which the individual parties were associated should not be able to surmount *Younger* obstacles which could not be overcome by its individual members. *Id.* at 830-31.

The situation such as that before us was considered by the Chief Justice, who suggested:

> "There is no need to attempt to further define those situations in which it would be proper to impute the state criminal prosecution of one who is not a federal plaintiff to one who is. The association of the state criminal defendant and the federal plaintiff necessary for imputation will depend upon facts of joint activity and common interest."

Allee, supra, 416 U.S. at 832 n.8 (Burger, C.J., concurring). The case before us is a somewhat stronger one for imputation than is the hypothetical one described above, since here seven of the 44 federal plaintiffs are state defendants.

President of the NPVOA, in the state proceeding gives the federal plaintiffs the "assurance that those presently being prosecuted will challenge the constitutionality of the regulations." Accordingly, in the discussion that follows, we will treat all federal plaintiffs identically.

One possible ground for invoking *Younger* abstention is that the state criminal proceedings, begun on July 15, 1974, were commenced prior to the filing of the third amended complaint, filed July 31, 1974. By treating the third amended complaint as a new cause of action, we would be within *Hicks v. Miranda,* 422 U.S. 332 (1975), which requires abstention if the state criminal charges are brought before any federal proceedings of substance on the merits. Although we may have discretion to so interpret the third amended complaint, compare *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 226-227 (1964) with *Cherry v. Morgan,* 267 F.2d 305 (C.A. 5 1959), we decline to do so. Instead we look to the plaintiffs' own actions.

Prior to our issuance of a stay this case was near its conclusion. The trial had been held and proposed findings and final written arguments had been submitted. Thereupon, at pages 7 and 8 of defendants' closing argument the following statement and proposal was made:

> "Although the Court need not dismiss this action on abstention grounds, the imminence of a ruling by the Alaska Supreme Court in the related criminal cases would warrant a stay of this action until the State cases are resolved. The

> briefs filed in those cases demonstrate that the same parties have through the same counsel presented many of the same legal arguments. Those arguments have been through the refining process of trial court adjudication and are expected by all to be resolved on appeal shortly. Needless to say, the State is hopeful of success in those cases, and we are confident that the fishermen will honor the Alaska Supreme Court's rulings. Accordingly, principles of comity would be served by a temporary stay of this proceeding pending the Alaska Supreme Court's decision, following which this Court could entertain motions to dismiss this action or such further briefing as may be desired."

Plaintiffs concurred in this proposal. While not calling their agreed procedure "abstention," the parties did agree on principles of comity to a stay of the federal proceeding until the state court could rule. The stay was granted and the Alaska Supreme Court has ruled. The question is whether a party can voluntarily seek a prior state court ruling on his claim and then reapply to a federal court if the state ruling is adverse, rather than pursue his state court remedies.

Two United States Supreme Court cases control the resolution of this problem. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964); *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975). *England* involved *Pullman*[6] rather than *Younger* ab-

[6] *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496 (1941).

stention, but it is relevant because a pending federal case was interrupted by a state court determination of the merits of the federal claim, similar to our case. *Huffman* involved *Younger* abstention and shows the effect of a state court decision on concurrent proceedings in federal court.

In *England* the three-judge district court abstained because of the presence of uncertain issues of state law. Both the state and federal issues were submitted to the state court which ruled adversely to the federal plaintiffs on each. When they returned to the district court, plaintiffs' claims were dismissed on grounds of res judicata and full faith and credit. 194 F.Supp. 521 (E.D. La. 1961). On review by the Supreme Court, it held that federal plaintiffs were not required to submit to the state court the federal issue, but were only required to inform the state court of the issue so that the state could construe state law in light of federal constitutional questions. Resolution of the federal issue could be expressly reserved to the federal forum by not submitting it to the state court. Thus, the Supreme Court preserved federal plaintiff's choice of a federal forum to resolve his federal claim. The Court did not, however, reserve to the federal plaintiff the right to have the matter resolved twice. At 375 U.S. 419 the Court stated:

> "But we see no reason why a party, after unreservedly litigating his federal claims in the state courts, although not required to do so, should be allowed to ignore the adverse state decision and start all over again in district court."

If this language is directly applicable to our case, then federal plaintiffs have waived their rights to a determination by us of the merits of their federal claim. However, there are substantial differences between *Pullman* and *Younger* abstention and blind cross-application of principles is unwarranted. For a distinction, see *Huffman v. Pursue,* 420 U.S. 592, 616 n.2 (1975) (Brennan, J. dissenting). But there are similarities. Here, federal plaintiffs were not required to request a stay of the federal proceedings in order to allow the state court to rule. By doing so they unreservedly litigated their federal claims in state court when not required to do so. Thus, their reapplication to our court is similar to the situation in *England* where the Supreme Court held that a litigant is not entitled to two chances on his federal claim.

Even if the above language is not directly applicable, nevertheless *England* is helpful in other aspects. The reason that the Court allowed the plaintiff to preserve his right to return to federal court by reserving the federal issue from the state court was to preserve plaintiff's right to choose a federal forum for his federal claim. "The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." 375 U.S. 415 quoting *Wilcox v. Consolidated Gas Co.,* 212 U.S. 19, 40 (1909). The major justification for preserving the federal district court forum is to preserve federal fact finding. "It is the typical, not the rare, case in which constitutional claims turn upon resolution of

contested factual issues." 375 U.S. at 416-417 quoting *Townsend v. Sain,* 372 U.S. 293, 312 (1963). But where the state proceeding is criminal, federal fact finding is preserved through habeas corpus. At note 8, 375 U.S. 417, the court states:

> "Even where fact findings on federal constitutional contentions are for state tribunals to make in the first instance, as in state criminal prosecutions, they are not immune, when brought into question in federal habeas corpus, from District Court consideration and, in proper cases, from *de novo* consideration. *Townsend v. Sain,* 372 U.S."

Thus, the reason for allowing the federal plaintiff immediately to return to the abstaining federal court after a state decision is lacking where the state proceeding is criminal and habeas corpus available. Federal fact finding is preserved in other ways.

Implicit in all of this is that after *Younger* abstention a federal plaintiff should not reserve his federal claim or defense, but should unreservedly submit it to the state court. Once having done so, he cannot immediately return to federal court after an adverse ruling, but must pursue his remedies by appeal and habeas corpus. He cannot return to the three-judge district court that abstained, at least not until the state proceeding is final.

The other guiding case in our decision is *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975). It involved a civil nuisance action by the State of Ohio seeking to close a theatre for exhibiting pornographic movies.

The Court held that this proceeding was sufficiently similar to a criminal prosecution to be within the limitations of *Younger*. The federal plaintiff sought to distinguish the nuisance action because of the non-availability of habeas corpus. The Court replied at 420 U.S. 606 (emphasis in original):

> "Appellee's argument, that because there may be no civil counterpart to federal habeas it should have contemporaneous access to a federal forum for its federal claim, apparently depends on the unarticulated major premise that every litigant who asserts a federal claim is entitled to have it decided on the merits by a federal, rather than a state, court. We need not consider the validity of this premise in order to reject the result which appellee seeks. Even assuming, *arguendo,* that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings. We do not understand why the federal forum must be available prior to completion of the state proceedings in which the federal issue arises, and the considerations canvassed in *Younger* militate against such a result."

In the succeeding paragraphs the Court may have undercut the premise of the right to a federal court forum. But to the extent that there is such a right, the majority felt that it arises at the termination of the state court proceedings.

The three dissenting justices did not agree that *Younger* was applicable. But they implied that where

Younger abstention is applicable federal relief is not available until the termination of the state proceedings. At note 2, 420 U.S. 616, Mr. Justice Brennan discussed this point:

> "Abstention where authoritative resolution by state courts of ambiguities in a state statute is sufficiently likely to avoid or significantly modify federal questions raised by the statute is another matter. Abstention is justified in such cases primarily by the policy of avoidance of premature constitutional adjudication. The federal plaintiff is therefore not dismissed from federal court as he is in *Younger* cases. On the contrary, he may reserve his federal questions for decision by the federal district court and not submit them to the state courts. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). Accordingly, retention by the federal court of jurisdiction of the federal complaint pending state court decision, not dismissal of the complaint, is the correct practice. *Lake Carriers' Assn. v. MacMullan,* 406 U.S. 498, 512-513, 92 S.Ct. 1749, 1758, 32 L.Ed.2d 257 (1972)."

If *Younger* abstention requires dismissal, as the quotation indicates, the federal plaintiffs' only remedies are to appeal the state court ruling and habeas corpus. Both remedies come after the termination of the state court proceedings. Thus, in the dissenters' view, as in the majority's, to the extent that there is a remedy, it comes after the state court decision is final.

The state has raised the issue of the res judicata and collateral estoppel consequences of the Alaska

Supreme Court decision. Because of our holding that the consequences of abstention prevent relitigation of the merits of plaintiffs' claims at this time, we need not consider the applicability of res judicata and collateral estoppel. It is not an issue entirely free from doubt. *Huffman, supra,* 420 U.S. at 607, note 19. See *Thistlethwaite v. City of New York,* 497 F.2d 339 (2nd Cir. 1974); *Goodrich v. Supreme Court of South Dakota,* 511 F.2d 316 (8th Cir. 1975). Compare the res judicata implications had a declaratory judgment been rendered by this court. *Steffel v. Thompson,* 415 U.S. 452, 470 (Brennan for the Court), 477 (White concurring), 482 (Rehnquist concurring) (1974). The reversal and remand by the Alaska Supreme Court may not be a final decision for res judicata purposes. *East Bay Union of Mach., Local 1304 v. Fiberboard Products Corp.,* 285 F. Supp. 282 (N.D. Cal. 1968) aff'd. 435 F.2d 556 (9th Cir. 1970). Because resolution of these complex questions is not necessary under our reasoning, we will not do so at this time.

In essence, what has happened in this case is abstention by stipulation. We see no difference between the consequences of abstention by agreement of the parties or by order of the court. In either case federal review of the state decision is postponed until the state proceedings are final. We do not sit as a court of appeals to review the decision of the Alaska Supreme Court.

For the reasons stated, the third amended complaint is dismissed as to all federal plaintiffs. The injunctive order issued by this Court on May 16, 1974, is now vacated. All prior controversy is declared moot.

/s/ Raymond E. Plummer
Raymond E. Plummer
Senior United States District Judge

/s/ James A. von der Heydt
James A. von der Heydt
United States District Judge

Dated: 6/11/76

WRIGHT, Circuit Judge, concurring in the result.

The res judicata and collateral estoppel effects of the final decision[1] of the Alaska Supreme Court in *State v. Bundrant,* 546 P.2d 530 (Ak. 1976), require that we dismiss the federal complaint as to those seven federal plaintiffs who are parties defendant in the state criminal proceeding.[2]

I agree with the analysis of the majority imputing the state criminal prosecution to the remaining 37 federal plaintiffs. While the relationship between the seven and the 37 is not such that the doctrines of res judicata and collateral estoppel should be applied to

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[1]The fact that only three of five Alaska Supreme Court Justices participated in *Bundrant* does not detract from the precedential value of that decision. *Cf.* Recent Cases, 86 Harv. L. Rev. 1307 (1973); Comment, 50 Wash. L. Rev. 901, 907 & n.42 (1975).

[2]The constitutional issues raised in the third amended federal complaint are the same as those decided by the *Bundrant* court. There is identity of parties as to the seven federal plaintiffs who are also state defendants in *Bundrant*. The federal defendants are in privity with the State of Alaska, the state plaintiff. Therefore, the estoppels are mutual.

those federal plaintiffs who are not state defendants, the relationship is sufficiently close to apply *Younger* principles to all federal plaintiffs.

I would treat the third amended complaint as a new claim, filed after the promulgation of new state regulations and commencement of state criminal proceedings pursuant to them.[3] *Younger* teaches that we must dismiss the third amended complaint as to all federal plaintiffs deemed subject to the state criminal proceeding.

---

[3]Plaintiffs' third amended complaint is actually a "supplemental pleading," since it "[sets] forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Fed. R. Civ. P. 15(d). The repeal of a statute, regulation or ordinance the enforcement of which has been previously enjoined, followed by enactment of a new measure, is a typical situation calling for the filing of a supplemental pleading. *See, e.g., Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 226-27 (1964).

While an amended complaint is not ordinarily regarded as a new "cause of action," this supplemental pleading should be. *Compare Cherry v. Morgan,* 267 F.2d 305, 305-06 (5th Cir. 1959). (But this does not preclude us from entertaining the supplemental pleading in the same lawsuit. *Cf. Rowe v. United States Fidelity and Guaranty Co.,* 421 F.2d 937, 942-44 (4th Cir. 1970). The need to avoid multiplicity of lawsuits, evidenced by ancillary and pendent jurisdiction doctrine, and by rules allowing liberal pleading and joinder of claims, supports a policy of freely admitting supplemental claims. *See Case-Swayne Co. v. Sunkist Growers, Inc.,* 369 F.2d 449, 462 (9th Cir. 1966), *rev'd on other grounds,* 389 U.S. 384 (1967). *See generally* 6 C. Wright & A. Miller, Federal Practice and Procedure § 1506 (1971); 3 J. Moore, Federal Practice ¶ 15.16[3] (2d ed. 1975).)

Plaintiffs argue, however, that the new state regulatory scheme, adopted June 15, 1974, is "simply a subterfuge and a flagrant violation of the outstanding injunction." *Compare Griffin,* 377 U.S. at 276-77. This suggests that the third amended complaint is not a new "cause of action" at all.

Such a suggestion, if accepted, would support the conclusion that "proceedings of substance on the merits [had] taken place in the federal court" prior to the July 15, 1974 filing by the state of its criminal complaint. *Hicks v. Miranda,* 422 U.S. 332, 349 (1975). In that event, Younger principles would not prevent this court from entertaining the third amended complaint.

However, I cannot agree with plaintiffs' premise. Scrutiny of the new regulations demonstrates that Alaska has sought to follow the suggestions in our prior opinion, 377 F. Supp. at 441. *See* 5 Alaska Admin. Code §§ 34.005, -.030, -.035, -.085, -.098.

While this new regulatory scheme implements the same purpose as that underlying the regulations whose enforcement we previously enjoined, the means employed here are different. *Compare Hjelle,* 377 F. Supp. at 432-33, *with Bundrant,* 546 P.2d at 533-34; *id.* at 558 (Rabinowitz, J., concurring). Where, as here, the state has made a conscientious effort to tailor its regulations to the language of the prior opinion of this court, there is no "subterfuge" or "flagrant violation" of our prior ruling. Rather, Alaska is engaged here in legitimate legislative experimentation. The situation in *Griffin, supra,* is in stark contrast.

Thus, I would treat the third amended complaint, actually a supplemental pleading, as the equivalent of a new claim challenging the regulations of June 15, 1974.

The Alaska court in *Bundrant* ruled in favor of the state with respect to the same constitutional claims as those presented in this federal action. Thus, there apparently remains no "adequate remedy at law" in the state system with respect to those constitutional claims. *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 601 (1975). In the absence of an adequate legal remedy, an equity court normally need not stay its hand.

However, the *Younger* doctrine is based not merely upon general equitable principles, but also upon

> . . . an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . [T]he National Government, anxious though it may be to vindicate and protect federal

> rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971), quoted in *Huffman, supra,* 420 U.S. at 601.

The Alaska court remanded the cause in *Bundrant* so that "the State may proceed to enforce its crab regulations" against the defendants. 546 P.2d at 556. The criminal trial on the merits is pending.

Federal plaintiffs mount a facial constitutional attack on Alaska's crab regulations and authorizing statutes. Were we to grant either declaratory or injunctive relief, our judgment would necessarily prevent any and all enforcement of those statutes and regulations. Thus, a judgment in favor of any of the federal plaintiffs would preclude the state from prosecuting the parties-defendant in *Bundrant*. Such a result would "unduly interfere with the legitimate activities" of the State of Alaska, and thereby violate the principles announced in *Younger* and its progeny.

For these reasons, I agree that the third amended complaint should be dismissed as to all federal plaintiffs.[4]

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[4]Unlike the majority, I would not rely on an "abstention by stipulation" rationale to dispose of this action. It is not clear to me that by requesting a stay pending decision in *Bundrant* those federal plaintiffs who are *not* state defendants have "unreservedly litigated their federal claims in state court. . . ." (Majority opinion at 7.)

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-1873

KONRAD S. URI, PER NYMARK, ARNOLD RASMUSSEN, RONALD BEIRNES, BORGE H. MANNES, CARL PEROVICH, BJORN NYMARK, SVERRE A. YRI, OLE HENDRICKS, SIGMUND ANDREASSEN, CORY A. KALDESTAD, MICHAEL LYNCH, JR., LARS MYHRE, THOMAS HAUGAN and EMIL VINBERG,
Appellants,

v.

STATE OF ALASKA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS

DOUGLAS M. FRYER
HENRY HAUGEN of
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BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS

I.

INTRODUCTION

In its effort to avoid review by this court, Alaska has urged two points. First, that there is a lack of finality in the Alaska Supreme Court resolution of jurisdiction in favor of the State,

and, second, that the passage of HR 200[1] has lessened the importance of the two principal issues presented by this appeal. These are: First, whether there is exclusive federal jurisdiction over living resources of the Continental Shelf. Alaska concedes that this holding is "final" in all respects (Motion to Dismiss, p. 8). The second issue relates to the assertion of jurisdiction by Alaska outside its territory in defiance of the position of the United States. It is this very assertion which is a final action which is so recognized by Oregon and California and which requires review by this court.

Existing law does not support Alaska and, while the passage of HR 200 is relevant, it does not lead to a contrary conclusion, nor affect the rights of appellants who face trial for acts committed before passage of HR 200. While it is understandable that the United States will claim pre-emptive rights on the basis of the new act, as it does under existing law, the new act

1. Now entitled The Fishery Conservation and Management Act, 16 USC § 1801, et seq.

does not diminish the importance of the basic jurisdictional question, particularly since Alaska seeks to construe language in this act on the basis of the opinion below to justify its expanded jurisdiction.

II.

THE JUDGMENT BELOW WAS FINAL IN DENYING APPELLANTS' SUPREMACY CLAUSE DEFENSES AND IN SUSTAINING EXTRATERRITORIAL JURISDICTION

The Alaska Supreme Court has held that control of the living resources of the Shelf, including crab, is not vested exclusively in the federal government and, hence, that appellants' attack upon the Supremacy Clause must fail. Alaska concedes--as it must--that this holding is final. Resolution of this issue alone in favor of appellants would dispose of the entire controversy and hence an appeal is appropriate. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

As to the holding below on extraterritorial jurisdiction, Alaska urges that this lacks finality in that it merely holds that "some

state regulation beyond the so-called three-mile limit is not forbidden per se." (Motion to Dismiss, p. 8). Alaska states that issues of "nexus" and the extent of the burden on commerce or foreign commerce remain. However, the court below did not rely on the "nexus" theory[2] and held as a matter of law:

> (1) We conclude that the commerce clause does not render regulation of fisheries in the Bering Sea the exclusive domain of the federal government.

(Jurisdictional Statement, p. A-23.)

> (2) Having concluded that the doctrines of federal exclusivity and pre-emption are not applicable, and that these regulations are not invalid under Supremacy clause of the Constitution of the United States, we turn now. . .

(Jurisdictional Statement, p. A-40.)

> (3) We therefore conclude that a state may reasonably extend its jurisdiction to control fish and game resources outside the limited area of its territorial sovereignty, if such an exercise is based on the conservation principles inherent in their migratory charateristics and not

2. ". . . [W]e are not persuaded that the state's creation of the concept of a 'crab fishing citizen is particularly helpful--or even appropriate . . .' Appendix A-57, Jurisdictional Statement.

> based on artificial boundaries or political circumstances.

(Jurisdictional Statement, p. A-54.)

> (4) In order that there is no confusion with regard to our holding, we reiterate that the difference in status between each offender does not affect Alaska's jurisdiction over him.

(Jurisdictional Statement, p. A-58.)

As to these crucial issues presented by this appeal, the decision of the Alaska Supreme Court is indeed final and is so recognized by Oregon and California.[3]

3. "Oregon also intends to enforce its regulations against all persons holding Oregon commercial fishing licensed [sic] or fishing out of Oregon ports. Our authority to do this is spelled out in the recent decision of the Alaska Supreme Court in Alaska v. Bundrant, et al., and the many cases cited therein." Jurisdictional Statement, Appendix H-1 & 2.

"The official position of California . . . is that all coastal states have the right to regulate fishing . . . in waters beyond the territorial limits of the coastal states . . . The right of any such coastal states to regulate such fishing is not limited to the citizens or residents of that state, but extends to citizens and residents of other states as well." Jurisdictional Statement, Appendix G-1.

When California requested leave to appear as amicus curiae in the Alaska Supreme Court it urged that the "litigation concerns the right of any coastal state, not just Alaska, to regulate fishing in waters beyond the territorial limits of the state." (Emphasis supplied).

Thus, the decision below presents in sharp focus the critical federal-state conflict as to jurisdiction over living shelf resources and extraterritorial enforcement by a state. It is a fundamental issue that all concerned observers recognize must be resolved by this Court:

> We moreover acknowledge that our decision today may provide the most effective vehicle for assuring that this matter will at last receive the prompt and definitive attention by the final arbiters of such questions--the Congress or the Supreme Court of the United States.

(Jurisdictional Statement, A-39.)

It is the very act of sustaining jurisdiction which is final action. Heretofore direct action by a state outside its territory over a non-citizen has been held to violate the Commerce Clause and the Due Process Clause as a matter of law. Hjelle v. Brooks, 377 F. Supp. 430 (D. Alaska 1974); United States v. California, 332 U.S. 19 (1947); Norfolk & Western Ry. v. Missouri Tax Comm'n., 390 U.S. 317 (1968); Alaska v. Arctic Maid, 366 U.S. 199 (1961). The Alaska Supreme Court was not pursuaded that a resolution of factual issues was material to its

holding[4] and the court was persuaded that adequate facts were established for sustaining the assertion of jurisdiction. It is not disputed that the alleged criminal activity of 14 of the 15 defendants took place at least 16 miles from shore and outside Alaska territory; that only one of the 15 defendants is an Alaska citizen; that the king crab being regulated is "sedentary species" which "are unable to move except in constant contact with the seabed or the subsoil of the Continental Shelf . . ." 16 USC § 1085; Geneva Convention on the Continental Shelf, 15 UST 471, TIAS 5578 (1958); and that the Alaska assertion extends to "an area hundreds of

---

4. Alaska urges that, while in the Bundrant case there was a stipulation of fact, in the Uri and Kaldestad cases there was none and that therefore there was no factual determination on which jurisdiction could be based. In the opinion below, the Alaska Supreme Court did not seek to differentiate between Bundrant and Uri. In their motion for reconsideration, appellants sought to draw a distinction between the two cases. In denying the motion, the Alaska Supreme Court held that it had adequate facts on which to base jurisdiction, including facts judicially noticed and that other defenses could be considered by the trial court. (Jurisdictional Statement, C 1-3.)

miles beyond Alaska's territory." Hjelle v. Brooks, 377 F. Supp. at 441; 5 AAC 34.900.

This is a criminal proceeding against appellants, not a declaratory judgment or injunctive proceeding. The result could be penal. The attempt by Alaska to assert jurisdiction and bring appellants to trial is the act which violates the United States Constitution and affords the finality necessary for this court to undertake review. Harris v. Washington, 404 U.S. 55 (1971); Local 438, AFL-CIO v. Curry, 371 U.S. 542 (1963).

Alaska urges that this court should not intervene as it could delay the outcome of the state court criminal trials. Alaska ignores that the Alaska Supreme Court which has primary responsibility for the administration of criminal justice granted a stay of proceedings apparently feeling that whatever jeopardy would occur to the prosecution was outweighed by the importance of this court resolving the issues presented by this appeal. Alaska also ignores that resolution of the issues in appellants' favor will result in final disposition of the controversy.

Defendants are charged and face criminal prosecution for actions undertaken admittedly outside Alaska territory and over which no authority has heretofore authorized such prosecution. Delay would mean that in the interim Alaska, Oregon and California and perhaps other states will pursue law enforcement on the high seas outside their territory.

Alaska contends that both the third and fourth categories of Cox are inapposite to establish the finality of the judgment below. The third category of Cox allows review in those cases where there is no "later review of the federal issue" if the party seeking review loses at trial. Alaska argues that Cox does not apply if there are other federal issues left to be decided and that here there is an "abundance" of such other issues. Actually, there are two other federal issues which have been raised beyond those ruled upon below: (1) Whether the warrantless search by Alaska law enforcement agents of appellants' crab pots was unreasonable under the Fourth Amendment, and (2) whether the Alaska regulations

were impermissibly vague under the Fifth Amendment. The first question, appellants concede, would not be substantial enough to warrant this court's consideration. In any event, the Alaska Supreme Court has now resolved this issue in another case.[5] The second question should not be of sufficient substance at this point to delay review of the more important question of jurisdiction.[6] The issue of vagueness was briefed and argued to the court below but apparently the Alaska Supreme Court felt that the issue was not significant enough even to warrant comment.

Certainly there are cases where this court has refused to review decisions where additional federal questions must later be resolved. See e.g. Hudson Distribs. v. Lilly & Co., 377 U.S. 386, 395 (1964), dissenting opinion of Mr. Justice

5. Nathanson v. State (No. 2541) opinion, August 27, 1976, ___ P.2d ___ (Alaska) holding that there was no reasonable expectation of privacy which would bring a crab pot within the protection of the Fourth Amendment.

6. See Jurisdictional Statement, page 7, footnote 6.

Harlan. It is submitted, however, that the additional issues here do not relate at all to the substantial questions of basic state power, jurisdiction and exclusive federal rights. Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963);[7] Local 438, AFL-CIO v. Curry, 371 U.S. 542 (1963).[8] The issues sought to be raised before this court go to the very heart of the right of Alaska to

7. The question of which court had jurisdiction to try a lawsuit.

"This is a separate and independent matter, antecedent to the merits, and not, emeshed in the factual and legal issues comprising the plaintiff's cause of action." 371 U.S. 558.

8. The question of whether the NLRB had exclusive jurisdiction over a labor dispute as opposed to a state court.

> The case is not whether a Georgia court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction (compare Gibbons v. Ogden, (U.S.) 9 Wheat. 448) nor is it the question of whether federal or state law governs a case properly before the Georgia courts. Compare Teamsters, C.W. & H. v. Lucas Flour Co., 369 U.S. 95. What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board.

371 U.S. 548.

bring appellants to trial at all. These questions are "separate and apart" from the question of whether appellants may be convicted. Harris v. Washington, 404 U.S. at 56. Alaska has not distinguished Harris or Local 438 which are controlling.[9]

The presence of other federal issues alone should not delay review, Hudson Distribs. v. Lilly, supra, particularly where those other issues are not jurisdictional and where resolution of the issues posed by this appeal in appellants' favor will not only be dispositive of the entire litigation, but will govern the extra-territorial law enforcement efforts of at least three states.

Alaska states that the third category of Cox likewise does not apply since if appellants succeed on retrial, the State may still appeal the "other federal issues" (Motion to Dismiss,

9. Compare Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), where a state supreme court order reversing a trial court's judgment that a state statute was unconstitutional and remanding for trial was held "final" for § 1257 review.

p. 18). However, the State's right to appeal, as distinct from requesting discretionary writs, is distinctly limited to testing the sufficiency of the indictment or information. Alaska Appellate Rule 5.[10] State v. Browder, 486 P.2d 925 (Alaska 1971). Thus, any acquittal not based upon a construction of the indictment or information would deny the state a right to appeal. Alaska does not even mention California v. Stewart, 384 U.S. 436, 497 (1966), in which this court granted review because an acquittal on the merits would have precluded the state from appealing nor does there appear to be any logic to the State's assertion that if appellants do win on the merits that Alaska must "abandon its

10. "Rule 5. Judgments From Which Appeal May Be Taken. Any appeal may be taken to this court from a final judgment entered by the superior court or a judge thereof in any action or proceeding, civil or criminal, except that the state shall have a right to appeal in criminal cases only to test the sufficiency of the indictment or on the ground that the sentence is too lenient." To the same effect is Alaska Statute 22.05.010. ". . . An appeal to the supreme court is a matter of right, except that the state shall have no right of appeal in criminal cases, except to test the sufficiency of the indictment or information. . ."

fishing laws" (Motion to Dismiss, p. 18). Obviously an acquittal by the jury or dismissal of charges by the court for lack of sufficient evidence will leave the fishing laws totally unaffected.

Alaska also contends that the fourth category of Cox[11] does not apply because the holding below does not seriously erode federal policy. It states that the United States has not made claim to the resource in spite of the position taken by the Department of Justice in the court below that federal jurisdiction was exclusive. In this regard the Attorney General is the spokesman for the United States in the courts and it is his duty to protect claims to government property. United States v. California, 332

11. This category allows review of decisions which (1) would allow the party seeking to prevail on the merits below, (2) where reversal on the federal issue would preclude further litigation rather than merely controlling its nature and character, and (3) where a refusal immediately to review would seriously erode federal policy.

U.S. 19, 27 (1947).[12] The Attorney General speaks for the United States not the Alaska Attorney General.

III.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A. The Position of the United States is in Conflict With the Opinion Below

The United States, in its brief as amicus curiae, claimed exclusive jurisdiction over king crab as a living resource of the Continental Shelf and that Alaska could not constitutionally regulate the activities of non-citizens of Alaska on the high seas. The opinion below rejected both contentions. In its motion to dismiss, Alaska seeks to avoid this conflict by stating

12. During the tide land legislation debates this was recognized by Senator Cordon. "Every state . . . must forever face the fact that some of these days . . . the Department of Justice will conclude that it desires to assume some additional jurisdiction and proceed to do so." Hearings Before Committee on Int. and Ins. Affairs, Senate, 82nd Congress, First Session, on S.J. Res. 20, Submerged Lands (1951) (p. 406).

that the only real concern of the United States is with respect to possible enforcement of Alaska regulations over foreign nationals, and that this case, according to the Alaska Supreme Court, does not present such an issue. This does not accurately reflect the position of the United States.

A critical threshhold question is whether the taking of living resources of the Shelf is "fishing" at all. See dissenting opinion of Mr. Justice Connor, Jurisdictional Statement, A-71, 78.

> Whether crabs are included in fishing rights, or are a resource of the ocean floor, for purposes of the act [OCSLA] is precisely the question at issue here.

The whole area of regulation of ocean floor resources is inextricably entwined with international law and affairs and with claims of the United States. United States v. California, 332 U.S. 19 (1947). the OCSLA preserves the rights of freedom of "fishing" on the high seas while claiming exclusive federal jurisdiction for taking of Shelf resources. 42 USC § 1332.

Senator Cordon's language indicated that the freedom of fishing is restricted to "all marine life above the land itself beneath the seas"--fish in the water column. Senate Rep. No. 411, 83rd Congress, 1st Session (1953).

> But crabs, in both international law, as related above, and municipal United States law, Bartlett Act, 16 USC Section 1085 (1964), are creatures of the sea floor, and not fish belonging to the water column "above the land itself".

Connor, Jurisdictional Statement, A-71.

Even if the taking of crab is "fishing" as distinct from harvesting shelf resources, unilateral action by any state of the union in international waters in a crab fishery utilized at present by three nations will have international complications. See dissenting opinion of Mr. Justice Connor, Jurisdictional Statement, A-78.

> Thus, if states may regulate "fishing" on the high seas generally, their regulations, once notified to the proper authorities, create international obligations.

Moreover, prior attempts by Alaska to assert its fisheries laws on the high seas are documented. For example, in United States v. Alaska,

422 U.S. 184 (1975), an incident is discussed wherein Alaska arrested three Japanese fishing vessel captains more than three miles from shore in Shelikof Strait and charged them with violation of Alaska regulations.

Alaska has failed totally to respond to the claim by the United States of exclusive jurisdiction over king crab as a living resource of the Continental Shelf. It is not even mentioned in the motion to dismiss. The federal government has, of course, acted as trustee for the citizens of all states in claiming this resource. In addition, the United States in the court below has sought to restrain an extension of Skiriotes v. Florida, 313 U.S. 69 (1941), whereas the opinion below has expanded Skiriotes to allow Alaska to regulate the citizens of other states such as appellants.[13]

13. The action of the Alaska Legislature in unanimously condemning appellants' actions is politically invulnerable, since appellants have no vote in Alaska. This is one of the aspects of the relationship between citizen and state which would seem to allow extraterritorial regulation.

Alaska has also failed to discuss that Oregon and California, in reliance upon the opinion below, and in defiance of the position of the United States, have asserted extraterritorial jurisdiction over non-citizens (Jurisdictional Statement, G-1, H-1).

B. The Passage of HR 200 Does Not Lessen the Importance of the Questions Posed

Alaska incorrectly contends that the Fishery Conservation and Management Act, 16 USC § 1801, et seq., lessens the importance of the questions posed.[14] The new statute does not resolve the questions presented in this case such as including the ownership and exclusive jurisdiction of king crab as creatures of the Shelf, and control by one state outside its territory over citizens of other states.

The new statute which is effective on March 1, 1977 establishes a "conservation zone" extending from the boundary of the state (3 miles for

14. Because defendants face jail sentences and fines if convicted there is no possibility of these cases becoming moot.

Alaska)[15] to a distance of 200 miles. 16 USC § 1811. The act then sets forth three distinct concepts which are germane here: (1) control of shelf resources, (2) federal management of fishing within the zone, and (3) state regulation within the zone.

In the new act exclusive federal regulation over living Shelf resources such as crab is provided for only in the area beyond the conservation zone, i.e., 200 miles. 16 USC § 1812(3).[16] There is no resolution whether the federal government has exclusive jurisdiction of Shelf resources within the zone as is posed by this case. Appellants urge that that is provided by the OSCLA.[17]

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15. 72 Stat. 339; 43 USC § 1312.

16. "The United States shall exercise exclusive fishery management authority in the manner provided in this chapter, over the following: (3). All Continental Shelf fishery resources beyond the fishery conservation zone."

17. Nor can Alaska argue that the failure of Congress to assume exclusive federal jurisdiction over shelf resources within the zone in 1976 indicates that Congress did not intend to do so in earlier years. United States v. Price, 361 U.S. 304; Pampanga Sugar Mills v. Wenceslao Trinidad, 279 U.S. 211.

With respect to the area within the zone the new act is ambiguous as to jurisdiction. It provides for federal management authority as "provided for in this chapter" over fish within the zone, 16 USC § 1812(1), but goes on to imply that states may continue to regulate in the same manner as is consistent with existing law. 16 USC § 1856(a). That proviso begins by stating that nothing in the act shall extend or diminish State authority within state boundaries. 16 USC § 1856(a).[18] It then provides that state regulation of fishing outside a state's boundaries is not permitted unless the vessel in question is registered under the laws of the state. "Registration" thus will permit state regulation

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18. This is similar to the Bartlett Act of 1966, 16 USC § 1094, which also states that "Nothing in this chapter shall be construed as extending the jurisdiction of the states to the natural resources beneath and in the seas within the fishery zone." (An area 9 miles outside state territory.) The opinion below brushed aside this statute as applying only to foreign fishing. Jurisdictional Statement, A-34. Compare Douglas v. Sea Coast Products, No. 75-1255, which held that the Bartlett Act pre-empted all state regulation of fisheries as to who is entitled to approve the entry of foreign fishing vessels within the marginal sea.

within the zone but is nowhere defined. It may well be a confirmation of Skiriotes v. Florida, 313 U.S. 69 (1941), that a state may regulate its own citizens beyond its boundaries since vessels are documented with the Coast Guard in the state or residence of the owners. 46 USC § 17. Alaska here urges, however, on the basis of the opinion below, that the state can require "registration" as a condition of landing fish and thus exercise extraterritorial jurisdiction (Motion to Dismiss, p. 21). Obviously, the new act does not provide an answer to the question of basic state authority over non-citizens. That issue is now presented to this court. The counsel to the Senate Commerce Commitee, a principal draftsman of the new act, has stressed the continued importance and necessity for review of the opinion below.[19]

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19. Letterhead Stationary of
United States Senate
Committee on Commerce
Washington, D. C. 20510

July 9, 1976

Alaska's citation of 16 USC § 1856(b) is also misplaced (Motion to Dismiss, p. 30). That section allows the Secretary of Commerce to assert exclusive fisheries jurisdiction "within the boundaries of such State" after notice and hearing. It has nothing to do with asserting jurisdiction outside a state's territory let alone with the question of federal ownership and control of living Shelf resources.

Mr. Douglas M. Fryer
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3300 Seattle-First National Bank Bldg.
Seattle, Washington 98154

Dear Mr. Fryer:

Thank you very much for a copy of your jurisdictional statement in the Uri case. I certainly hope the Court grants review, as I firmly believe this is a very important national issue which should be resolved at this time. I would certainly appreciate any further information you have about the case, particularly any other briefs that may easily be made available to me.

Best personal regards.

Sincerely yours,

s/ Bud Walsh
James P. Walsh
Staff Counsel
JPW:bwa

C. The Conflicts Between the Opinion Below and Federal Decisional Law Remain

1. The Hjelle case

Alaska makes a number of statements about Hjelle v. Brooks, supra, which are inaccurate and misleading and which require clarification.[20] Hjelle is a civil case involving issues to some extent broader than as posed here.

(a) Exclusive federal jurisdiction

Alaska states that the Hjelle court discounted the Supremacy Clause argument. However, the reason that the original Hjelle opinion

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20. Alaska commences the series of misleading statements by stating

"These regulations were originally challenged by a group composed of the same class, if not the same persons, as appellants . . . in the United States District Court for the District of Alaska. The action was dismissed in June 1970." (Motion to Dismiss, p. 3).

The regulations here challenged were not even promulgated until June 1974. (Motion to Dismiss, p. 4). The 1970 case never proceeded to any disposition let alone a reported one. It did involve Alaska's attempt to reduce the federally established minimum crab size and it was dismissed by agreement when Alaska agreed to conform to federal standards. It is not relevant to these proceedings except to show that the litigation over Alaska's extraterritorial assertion has existed for more than six years. North Pacific Fishing Vessel Owners Association v. Norenberg, U S. District Court, Alaska, No. J-9-70.

determined that at that "incipient stage" (motion for preliminary injunction) it did not appear that plaintiffs were reasonably certain to succeed on the supremacy argument was because:

> The complexity of the issues involved, magnified by the necessity to probe deeply into legislative history to determine the intent of congress in enacting the Outer Continental Shelf Lands Act, does not lend itself to resolution at this stage of the litigation."

377 F. Supp. 438.

This can hardly support Alaska's contention.

(b) Extraterritorial jurisdiction

Alaska contends that the Hjelle court "following an August 1975 trial," refused to enjoin enforcement of the new regulations because of their "apparent validity" (Motion to Dismiss, pp. 4, 5, 24). This is a serious misstatement. The Hjelle court in June 1976 abstained from any decision on grounds of Younger v. Harris, 401 U.S. 37 (1971). The court did indicate that in June 1974 it had declined a preliminary injunction against the new emergency regulations because of "their possible validity." (Motion to Dismiss, Appendix A, ii). Then in 1976, the court abstained

and declined to consider the evidence presented in any manner.

The Hjelle court did decide in its earlier opinion that a direct assertion of extraterritorial power by Alaska violated the Due Process Clause of the 14th Amendment and the Commerce Clause as a matter of law. 377 F. Supp. 430. The Alaska Supreme Court expressly refused to follow this holding.[21]

(c) Landing laws

Nor did the Hjelle opinion suggest, as Alaska asserts, that direct regulation could be accomplished outside Alaska through a landing law, "If carefully writen to serve local goals." (Motion to Dismiss, p. 4, 377 F. Supp. 441). What the Hjelle opinion was talking about there was the possibility that enforcement inside Alaska might be accomplished through a carefully worded landing law even though such enforcement

21. "We do not find the state's interest in regulation is as limited as the position asserted by appellees and adopted by the three judge federal court in Hjelle." Jurisdictional Statement, A 49-54.)

might indirectly affect crab taken outside of the state.[22] Similarly, Alaska's argument that the landing law cases support its direct enforcement on the high seas is without merit. Every landing law case involves enforcement within the confines of the state and, hence indirect offshore enforcement. Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936); Silz v. Hesterberg, 211 U.S. 31 (1908); Felton v. Hodges, 374 F.2d 337 (5th Cir. 1967); Frach v. Schoettler, 46 Wn.2d 281, 280 P.2d 1038. While some of the issues in Hjelle did involve the legitimacy of the landing laws, these cases do not. Defendant Kaldestad's case is the only one involving a land law and his defense is based solely on the Supremacy Clause.

2. United States v. Ray

The State is also unsuccessful in attempting to explain United States v. Ray, 423 F.2d 16

22. ". . . [I]f [Alaska's] regulations were directed at conserving crab within Alaska waters by regulating crabbing in that area and, in order to facilitate enforcement, by prohibiting the possession of crab in the state during the closed season, even if that crab were caught outside the State." 377 F. Supp. 441.

(5th Cir. 1970), as not being in conflict with the opinion below. The Ray case expressly held that any doubt as to whether living resources of the Shelf were included within the meaning of the Outer Continental Shelf Lands Act was dispelled by the Geneva Convention of 1958.

> To the extent that any of the terms of the Act (OCSLA) are inconsistent with the later adopted Geneva Convention on the Continental Shelf, they should be considered superseded. See Cook v. United States, 288 U.S. 102, 118-119. (423 F.2d at 21).

Thus, the holding of the Ray case is that living resources of the Shelf are included within the meaning of natural resources under the OCSLA whereas the opinion below holds they are not. Alaska's characterization of the Ray case as a trespass case is not accurate.

> Although the complaint is inaccurately framed in terms of trespass in count one, the Government repeatedly stresses it is not claiming ownership of the reefs.

423 F.2d at 22. The injunction was there granted because "under national and international law" (423 F.2d 22), the resources were subject not only to United States jurisdiction but its control

as well.[23] The legislative history of the OCSLA will demonstrate that exclusive, sole jurisdiction of all Shelf resources was intended and that the attempts by states rights advocates for concurrent state jurisdiction were decisively defeated on two occasions. 1953 Cong. Rec. 7232, 7236. As aptly stated in United States v. Texas, 339 U.S. 707, 719 (1950), prior to the passage of the OCSLA or Submerged Lands Act:

> If the property, whatever that may be, lies seaward of low water mark, its use, disposition, management and control involve national interests and national responsibilities.

(Emphasis supplied).

The holding of the Ray case, that living resources, such as sedentary speci are included within such definition either because of the legislative history of the OCSLA, the SLA or the

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23. One other case proffered by Alaska in support of its position is the unreported decision of United States v. Thompson (Motion to Dismiss, p. 32), which involved a federal prosecution under state regulations of United States citizens for poaching of polar bears outside Alaska territory.

Geneva Convention is in direct conflict with the Alaska Supreme Court.

IV.

CONCLUSION

The Alaska Supreme Court has shown great care in its opinion to establish the finality of its judgment on the substantial federal issues presented by this appeal. The opinion is so regarded by two other states, Oregon and California. Alaska is irresponsible in arguing now that, after the uncertainty of 6 years of litigation, appellants must return to the trial court for a determination of whether the regulations are vague. Alaska ignores the invitation for review by the Alaska Supreme Court itself in both the opinion below and stay pending this appeal.

Alaska argues that HR 200 has lessened the importance of the questions presented by this appeal and at the same time uses the opinion below as a basis for extended jurisdiction under the new act as well as under existing law. A

decision by this court as to the basic state power is essential to an understanding of this act.

In view of the uncertainty facing all parties about the extraterritorial jurisdiction of coastal states, the conflicts posed, and the effect on the international fisheries, this court should hear this appeal.

There is no legal authority to sustain the extraterritorial action of Alaska and Alaska's reference to these cases as "stop gap" pending passage of HR 200 (Motion to Dismiss, p. 20) does not validate the assertion. In the event this court chooses not to delineate the jurisdiction of coastal states prior to HR 200, the cases should be summarily reversed.

Respectfully submitted,

DOUGLAS M. FRYER
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Counsel for Appellants

CERTIFICATE OF SERVICE

I, DOUGLAS M. FRYER, a member of the Bar of the Supreme Court of the United States and one counsel for Appellants in the above-captioned matter, hereby certify that three (3) copies of this Brief of Appellants in Opposition to Motion to Dismiss have been served upon each counsel of record for the parties herein by depositing the same in the United States Post Office with postage prepaid (airmail designation no longer required by post office), this 17th day of September, 1976, as follows:

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Attention: EVELLE J. YOUNGER, CARL BORONKAY
and RODERICK WALSTON

All persons required to be served have been served.

DOUGLAS M. FRYER